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OCTOBER TERM, 1992

TWIN CITY FIRE INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, HARTFORD ACCIDENT AND INDEMNITY COMPANY, HARTFORD CASUALTY INSURANCE COMPANY, HARTFORD UNDERWRITERS INSURANCE COMPANY, HARTFORD INSURANCE COMPANY OF THE MIDWEST, NEW ENGLAND INSURANCE COMPANY, AND HARTFORD INSURANCE COMPANY OF CONNECTICUT,

Petitioners,

—v.—

SAMUEL F. FORTUNATO, COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF INSURANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state force a corporation to continue to engage in a particular business within its borders by imposing massive penalties on exit from the state, including forfeiture of property unrelated to that business owned both by the corporation and by seven separate affiliated corporations, without violating the Due Process and Takings Clauses?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the American Insurance Association, Chubb Insurance Company of New Jersey, Federal Insurance Company, Vigilant Insurance Company, Pacific Indemnity Company, Great Northern Insurance Company, Chubb Custom Insurance Company, State Farm Mutual Automobile Insurance Company, State Farm Fire and Casualty Insurance Company, State Farm Life Insurance Company, and State Farm Annuity and Life Insurance Company, submitted amici curiae briefs to the New Jersey Supreme Court.

STATEMENT PURSUANT TO RULE 29.1

Petitioner Twin City Fire Insurance Company is a corporation organized under the laws of Indiana, and is a wholly-owned subsidiary of Hartford Fire Insurance Company. ITT Hartford Group, Inc., a wholly-owned subsidiary of ITT Corporation, is the parent company of Hartford Fire Insurance Company and, derivatively through Hartford Fire, the parent of Twin City and the other affiliates that also are Petitioners in this case.

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PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

Petitioners Twin City Fire Insurance Company ("Twin City") and its affiliates Hartford Fire Insurance Company, Hartford Accident and Indemnity Company, Hartford Casualty Insurance Company, Hartford Underwriters Insurance Company, Hartford Insurance Company of the Midwest, New England Insurance Company, and Hartford Insurance Company of Connecticut (hereinafter referred to collectively as the "Affiliated Corporations"), respectfully petition this Court for a writ of certio-

rari to review the judgment and opinion issued by the Supreme Court of New Jersey in this case.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported at 609 A.2d 1248 (N.J. 1992). A-1-33.[1] The opinion of the Appellate Division of the New Jersey Superior Court is reported at 591 A.2d 1005 (N.J. Super. App. Div. 1991). A-34-56.

JURISDICTION

The Supreme Court of New Jersey entered its judgment on July 29, 1992. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Fifth Amendment

The Takings Clause of the Fifth Amendment to the United States Constitution, as it is incorporated and applied to the State of New Jersey through the Fourteenth Amendment, provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

Fourteenth Amendment

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of . . . liberty, or property, without due process of law. . . .

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1 Numbers following the letter "A" denote reference to the appendix to this petition.

N.J. STAT. ANN. § 17:33B-30

This petition also involves Section 72 (N.J. STAT. ANN. § 17:33B-30 (West 1992)) of New Jersey's Fair Automobile Insurance Reform Act of 1990 ("FAIRA"). Section 72 is reproduced in the Appendix at A-57.

STATEMENT

A. Nature of the Case.

This case raises the novel and important question of whether a state violates the Due Process and Takings Clauses when it forces corporations to choose between surrendering the liberty to cease doing business in the state or forfeiting valuable property rights. The State of New Jersey put Petitioners to that choice when Petitioner Twin City decided to stop selling private passenger automobile insurance in the State.

While this Court has never explicitly defined a corporation's right to exit from business operations in a state, this Court's teachings in other areas demonstrate that the liberty to exit is constitutionally protected. Nevertheless, in the absence of explicit guidance from this Court, New Jersey has been able to prevent Petitioner Twin City from exercising its right to cease doing business in the State. If New Jersey's scheme to preclude exit is allowed to stand unreversed, it will be available to regulators currently facing difficult insurance problems in many states.

B. The Statutory And Regulatory Scheme Used By Respondent To Block Twin City's Exit From New Jersey's Private Passenger Automobile Insurance Market.

Twin City sought to withdraw from New Jersey's private passenger automobile insurance market in March, 1990. At that time, Twin City was writing only one half of one percent of the private passenger automobile insurance in the New Jersey market. On March 7, 1990, Twin City began the process of a phased and orderly withdrawal by surrendering its certificate

of authority and issuing notices of nonrenewal, pursuant to applicable statutes, for policies that were to expire in sixty to ninety days. Within a week after Twin City attempted to exit, the Fair Automobile Insurance Reform Act of 1990 ("FAIRA") became law.

New Jersey officials vigorously opposed Twin City's departure. On the basis of FAIRA, Respondent rejected Twin City's relinquishment of its certificate of authority to write private passenger automobile insurance.[2] Respondent instituted a state court action to compel Twin City's compliance with Section 72 of FAIRA.[3] In response, Twin City submitted a formal plan for its orderly withdrawal from New Jersey's private passenger automobile insurance market. A-58-70. Twin City's plan included, among other things, a one-year runoff of its policies, a guarantee of Twin City's liabilities by its parent company,

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2 At the time this controversy arose, New Jersey was struggling to find a solution to a $3 billion debt arising from the failed operations of a quasi-governmental joint underwriting association ("JUA"), which the State created to provide insurance coverage for high-risk drivers who could not obtain insurance in the private market. Under FAIRA, the State imposed substantial financial assessments and surcharges on insurance companies operating in New Jersey in an effort to retire the JUA debt. N.J. STAT. ANN. § 17:30A-8(a)(9) (West 1992) (assessments); N.J. STAT. ANN. § 17:33B- 49 (West 1992) (surcharges).

3 Section 72 established a statutory withdrawal law for the first time in New Jersey. The New Jersey Supreme Court previously had recognized that an insurer has the right to surrender its license. *Sheeran v. Nationwide Mut. Ins. Co.*, 404 A.2d 625, 630 (N.J. 1979). Section 72 provides in relevant part that an insurer:

> may surrender . . . one or more kinds of insurance specified in the certificate of authority, only after the submission of a plan which provides for an orderly withdrawal from the market and a minimization of the impact of the surrender or discontinuance on the public generally and on the company's policyholders in this State. The plan shall be approved by the commissioner before the withdrawal or discontinuance takes effect. In reviewing a plan for withdrawal under this section, the commissioner shall consider, and may require as a condition of approval, whether some or all other certificates of authority . . . held by the company or by other companies in the same holding company as the company submitting the plan should be surrendered. . . .

N.J. STAT. ANN. § 17:33B-30 (West 1992). A-57.

and its submission to the jurisdiction of the New Jersey Department of Insurance for continued regulatory oversight during the winding down of Twin City's insurance obligations in the private passenger automobile market. A-68.

Section 72 of FAIRA authorizes Respondent to impose conditions that may prevent insurers from exiting the State's chronically troubled private passenger automobile insurance market. On August 14, 1990, Respondent used the authority of Section 72 to issue Administrative Order No. A90-151 (the "Order"). A-71-97. The Order nominally approved Twin City's exit, but imposed conditions that forced Petitioners to make a "choice." Twin City could forfeit its right of exit and continue to write private passenger automobile insurance in the State indefinitely, or, if Twin City "chose" to withdraw from the market, Petitioners would have to surrender all of their respective authorities to write various lines of insurance in the State as the price of Twin City's exit. Among other conditions imposed on Twin City's exit, Respondent specifically required that: (1) Twin City must terminate all of its other property and casualty business in New Jersey (the "Other-Business Condition"); (2) the Affiliated Corporations (which did not seek to exit) must surrender all of their respective licenses to write property and casualty insurance, including private passenger automobile insurance (the "Forfeiture Condition")[4]; and (3) Twin City must

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4 The preponderance of the insurance business to be forfeited did not even involve private passenger automobiles. In 1991, the Affiliated Corporations' respective businesses generated the following premiums from various New Jersey insurance markets: Hartford Accident and Indemnity Company, $1,258,491; Hartford Casualty Insurance Company, $26,013,557; Hartford Fire Insurance Company, $48,454,827; Hartford Insurance Company of the Midwest, $17,344,738; Hartford Insurance Company of Connecticut, $10,960,297; Hartford Underwriters Insurance Company, $17,004,329; and New England Insurance Company, $4,372,423. In the aggregate, the Affiliated Corporations generated $192,268,583 in premiums. Of that amount, The Affiliated Corporations generated $17,692,510 in annual premiums from private passenger automobile customers, and Twin City generated annual premiums of $29,537,573 from servicing its small share of New Jersey's private passenger automobile insurance market.

expand its business in New Jersey by writing additional private passenger automobile policies for five years (the "Mandatory New-Business Condition").[5] A-93-95. The Order summarizes that: "Controls over market entry and exit are essential parts of the regulatory scheme provided by statute." A-84. The lower courts held that Respondent's actions are constitutionally permissible.

C. The Decisions Below.

Twin City and the Affiliated Corporations filed an action in the Appellate Division of the New Jersey Superior Court, challenging the validity of Respondent's Order under the Due Process and Takings Clauses.[6] The court held that the Forfeiture and Other-Business Conditions do not violate the Takings Clause. A-43. The court reasoned that "the *choice* given appellants by Section 72 does not constitute a 'taking.' " A-39 (emphasis added). The appellate court then applied the three-part test enunciated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and found that no taking had occurred. A-39-43.

The appellate court also rejected Petitioners' argument that the conditions of Respondent's Order violated the Due Process Clause. The court framed the due process question as

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5 Respondent has ordered that, unless Twin City places its business with another insurer acceptable to Respondent (which is virtually impossible in view of the unfavorable market conditions created in part by regulatory misfeasance and malfeasance), Twin City must not only renew all existing policies but also must absorb mandatory quotas of additional residual market business for five years. A-80-81. *See also* N.J. STAT. ANN. § 17:33B-11(c)(5). The effect of these provisions is dramatic. Twin City's private passenger policies in New Jersey more than doubled from 15,971 as of March, 1990 to 36,627 as of September, 1992. Twin City is projecting losses of some $100 million as a result of the conditions contained in the Order.

6 Petitioners also brought administrative procedural challenges to the Order, as well as other constitutional challenges under the Equal Protection Clause. The courts below rejected those challenges.

> whether Section 72 strikes a rational balance between a private passenger automobile insurer's desire to withdraw from the market and the public's need for it to remain in the market to share the burden of bailing out and depopulating the JUA and to continue to provide coverage to its policyholders and other applicants. A-45.

Under this framework concerning the due process right of exit, the court held that Section 72 did not violate the Due Process Clause. A-52.

On appeal, the New Jersey Supreme Court agreed with the intermediate appellate court's ruling that the Forfeiture and Other-Business Conditions on Twin City's exit did not violate due process. A-32. In holding that the State had a legitimate interest in obstructing Twin City's right of exit, the court noted:

> In such a period of regulatory turmoil and uncertainty, nothing short of severe regulatory measures imposed on private-passenger insurers threatening to withdraw—in other words, strong medicine—would be effective. If the forfeiture condition discourages withdrawal, a substantial state interest—retention of private-passenger insurers—will have been advanced. A-20.

For this reason, the court held that the Forfeiture and Other-Business Conditions did not violate principles of substantive due process.[7] *Id.*

The New Jersey Supreme Court also agreed with the intermediate appellate court that Respondent's Order did not violate the Takings Clause. The court focused its takings analysis by distinguishing cases involving physical invasions of property from the so-called regulatory takings cases. A-26-28. The court neglected to recognize, however, that this case involves a total deprivation of Petitioners' intangible property, not merely a reduction in the value of that property. The court conceded that

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7 The supreme court also applied this legitimate-state-purpose analysis in rejecting Petitioners' takings arguments. A-30.

the "economic impact [to Petitioners] is potentially quite severe. . . ." A-30. Nevertheless, the court assumed that Petitioners would not be totally deprived of their property since they could apply their resources to business in other states. A-31-32. The court then purported to apply this Court's ad hoc balancing test to hold that the Forfeiture and Other-Business Conditions of Respondent's Order did not constitute a taking, but the court misconstrued each element of the test. A-30-31. Finally, the court rejected the argument of amicus curiae, American Insurance Association, that the Order violated the doctrine of unconstitutional conditions, holding that no condition in the Order violated the Constitution. A-32.

REASONS FOR GRANTING THE WRIT

I.

This Case Provides A Timely Opportunity For This Court To Advise The States That Schemes Which Force A Corporation To Choose Between Forfeiting Valuable Property Rights And Surrendering the Liberty To Cease Doing Business In A State Violate The Due Process Clause And The Takings Clause.

A. Overview.

One of the most critical aspects of the Federal Constitution is the delicate balance it creates between state and federal power. The free flow of commerce across the borders of the several states is a fundamental and essential tenet of the Founding Fathers' design. While Congress regulates interstate commerce, it largely deferred regulation of the business of insurance to the states by means of the McCarran-Ferguson Act. 15 U.S.C. §§ 1011 *et seq.* However, the State of New Jersey, with its legislative, executive, and judicial branches acting in concert, now has expanded the power to regulate dangerously beyond sound limits to the point at which it has become the power to destroy the business of insurance. This precedent, left

unchecked, undoubtedly will be followed by other states eager to shift the problems created by inept regulation of various troubled insurance markets (*e.g.*, automobile, health, and workers' compensation) from government to private industry through conscription of insurers' services.[8]

There is nothing in the McCarran-Ferguson Act or its legislative history to suggest that Congress intended—by deferring primary regulation of the insurance industry to the states—to strip insurance corporations of constitutional rights applicable to all other citizens. In this case, under the guise of regulating insurance, Respondent has trampled upon Petitioners' fundamental due process right to exit from an undesirable regulatory system. Unless this Court makes it clear to New Jersey and other states that federal due process includes the right of egress

8 There is already a significant trend of states attempting to blockade state borders to prevent insurer exit. Massachusetts has repeatedly attempted to block insurer exit pursuant to a statute (MASS. GEN. L. ch. 175, § 22H (1992) that permits the suspension of a withdrawing automobile insurer's licenses for all lines—as well as the licenses of the insurer's affiliates. Massachusetts's highest court has upheld use of this statute to preclude insurer exit. *See Maryland Casualty Co. v. Commissioner of Ins.*, 363 N.E.2d 1087 (Mass. 1977) (rejecting challenges based on federal due process and equal protection).

Recently, Massachusetts imposed severely punitive conditions on an attempt by Aetna Casualty and Surety Company to exit from the State. In a complaint filed in the United States District Court for the District of Massachusetts (Civ. Action No. 90-11081-MC), Aetna alleged that its attempts to withdraw from the private passenger automobile market had been burdened with unconstitutional conditions: the State threatened Aetna with forfeiture of its non-private passenger insurance licenses unless Aetna would agree to subsidize an assigned-risk pool for nearly a decade. The case was dismissed pursuant to a settlement on January 1, 1992, and thus this Court had no opportunity to review the constitutionality of Massachusetts's scheme.

California and New York also have attempted to preclude automobile insurer exit through the application of mandatory policy-renewal statutes. *See Travelers Indemnity Co. v. Gillespie*, 785 P.2d 500 (Cal. 1990); *People ex rel. Lewis v. Safeco*, 414 N.Y.S.2d 823 (N.Y. Sup. Ct. 1978). Those courts interpreted the statutes involved as not precluding exit. If the New Jersey Supreme Court opinion is allowed to stand, officials in California and New York may be emboldened to imitate New Jersey's scheme.

from regulatory oppression, the delicate balance of federal and state power envisioned by the Constitution will collapse and state balkanization of the insurance industry will ensue.[9]

B. The Right To Decide Whether To Do Business Within A State Is Protected Under The Due Process Clause.

Respondent, through the conditions in the Order, has erected massive barriers to block Twin City's exit from a market for the express purpose of escaping insurance problems, particularly the JUA deficit, that the State allowed to develop for many years. In so doing, Respondent has impermissibly burdened Twin City's constitutionally protected liberty without due process of law. By invalidating Respondent's Order, this Court will affirm a principle that is critical to free enterprise nationwide, namely, that a state may not constitutionally prevent a corporation from leaving a market in order to conscript that entity for public service in a market mismanaged by the State.

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9 The process of balkanization already is reflected in the various state attempts to preclude insurers from exiting automobile insurance markets, *see* note 8, *supra*, or to protect their insureds from the consequences of such actions by other states. Iowa recently promulgated a provision under which the state insurance commissioner may order a domestic insurer to withdraw from any or all lines of business being sold *in another state* upon a finding that the domestic is incurring operating losses in the other state. IOWA ADMIN. CODE § 191-5.7 (1992). New Jersey's scheme of precluding exit thus runs directly counter to Iowa's law, which may require insurer exit from a state outside of Iowa. Since Twin City is projecting losses of $100 million in New Jersey over the next five years pursuant to the Mandatory New-Business Condition, it would face a "Catch 22" situation if it were an Iowa domestic. New Jersey would preclude exit while Iowa would require it.

In addition, Maine is attempting to solve problems with its workers' compensation system by imposing assessments that apply to companies even after they have withdrawn from the State. The assessments are based on the combined surpluses of a company and its affiliates, and it appears that affiliates not conducting any business in Maine would be included in the surplus assessment calculation so long as one corporation in the affiliated group was authorized to write workers' compensation insurance in Maine. In a recent litigation, the State cited the opinion of the New Jersey Supreme Court in this matter to justify imposition of the assessments. *State Farm Fire & Casualty Co. v. Superintendent of Ins.*, Civ. Action No. CV-92-83 (Me. Sup. Ct. 1992).

The New Jersey Supreme Court recognized, as it must, that Respondent's Order could pass muster under the Due Process Clause only upon a showing of a legitimate state purpose, as well as a rational connection between that purpose and the means selected to achieve it. A-16. The court erred, however, in applying this standard by embracing an illegitimate state purpose and by endorsing regulatory mechanisms that do not rationally achieve any legitimate state aim.

1. The Purposes Of Respondent's Scheme Of Conditions Cannot Be Deemed To Be Legitimate.

In essence, the New Jersey Supreme Court endorsed as "legitimate" state goals: (1) the forced retention of insurance companies; and (2) the involuntary servitude of insurers in a particular market that the State itself decides an insurer should continue to serve. These goals are not only illegitimate and arbitrary, they are repugnant to the economic tenets of a free society, and are properly invalidated under the Fourteenth Amendment for the following reasons.

a. Under Clear Supreme Court Precedent, A State May Not Compel A Corporation To Do Business.

This Court long ago rejected as unconstitutional a state's attempt to force a company to conduct business against its will. In *Frost & Frost Trucking Co. v. R.R. Commission*, 271 U.S. 583 (1926),[10] California sought to force a private carrier to

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10 This Court recently has reaffirmed under the Takings Clause that a state may not constitutionally compel an individual to do business—even where the business is highly regulated and the law provides for a fair rate of return. For example, in *Yee v. City of Escondio*, 112 S. Ct. 1522, 1528 (1992), this Court sustained the constitutionality of a rent control ordinance because the regulatory scheme did not compel petitioners to continue renting their property in perpetuity.

In his dissent from dismissal of an appeal in *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 878, (1983), then Justice Rehnquist observed that a state acts unconstitutionally when it precludes a property owner from removing a rent controlled unit from the market:

become a common carrier by threatening to withdraw the privilege of using the state's highways. This Court firmly rejected that effort under the Due Process Clause. A state could not constitutionally convert a private carrier to a common carrier "by mere legislative command. . . ." *Id.* at 592. Accordingly, a state could not achieve the same result by threatening the loss of a privilege. *Id.* at 592-595 and 599. California's attempt to dress up coercion as "choice" did not change the analysis:

> The act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden.

Id. at 593. *Cf. Union Pacific R.R. Co. v. Public Service Comm'n*, 218 U.S. 67, 70 (1918) (Justice Holmes remarking that "[i]t always is for the interest of the party under duress to

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> The provision in the . . . statute ensuring a fair net operating income to the landlord does not change the result that should attend this case. In previous decisions we have recognized that property ownership carries with it a bundle of rights, including the right "to possess, use and *dispose* of it." (emphasis added) (citation omitted).

Similarly, in *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2332 (1992), this Court recognized that the right to travel enjoys heightened scrutiny under the Equal Protection Clause. *See also Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 258 (1974). A state may not infringe upon this important right based solely on the rational basis test. This Court's protection of the right to leave/travel under various constitutional provisions underscores the importance of protecting the right that Respondent threatens to usurp in this case—the right to exit a market. *Cf. Apetheker v. Secretary of State*, 378 U.S. 500, 514 (1964) (law prohibiting issuance of passports to Communists held to be unconstitutional on its face because it violated due process right to exit the country); *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (right to travel is part of the "liberty" protected by the due process clause); *Crandall v. State of Nevada*, 73 U.S. 35, 49 (1867) (tax imposed on persons exiting state by carrier violated constitutionally protected right to travel).

choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress."). Likewise, Respondent in the case at bar may not indirectly force Twin City to serve a market that the State itself chooses by imposing conditions that require enormous forfeiture of property. Respondent's devious scheme to preclude exit is blatantly devoid of legitimate purpose.

In the courts below, New Jersey took the same position adopted by California and rejected by this Court in *Frost*: Respondent claimed that New Jersey's scheme was constitutional because Twin City had a choice. As *Frost* makes clear, however, New Jersey's scheme seriously violates this Court's long-standing doctrine of unconstitutional conditions, which precludes states from "impos[ing] conditions which require the relinquishment of constitutional rights." *Frost*, 271 U.S. at 593-594. "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Id.*

New Jersey's scheme is considerably more egregious than the scheme invalidated in *Frost*. The carrier in California could have preserved its constitutional right of due process by foregoing a privilege. In New Jersey, Respondent is forcing Petitioners to surrender constitutional rights under any course of action available. If Twin City remains in New Jersey, it surrenders its liberty, guaranteed by the Due Process Clause, to choose an occupation and to move freely across state lines. If Twin City exercises its right to exit, both Twin City and the Affiliated Corporations must surrender highly valuable property rights guaranteed by the Takings Clause. *See* pages 20-25, *infra*.

In *Yee v. City of Escondio*, this Court recently indicated a particular interest in cases in which a state impairs the right to exit a market. The Court in *Yee* sustained the constitutionality of a rent control ordinance, but observed that "[a] different case would be presented were the statute, on its face or as applied,

to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." 112 S. Ct. at 1528. Petitioners respectfully submit that the instant case presents this precise issue.[11] It is unquestionably an issue of national significance that is appropriate for this Court to review.

b. The Right To Exit From A Business Is Firmly Rooted In The Legal Tradition Of This Country.

The right to "ingress and egress" recognized in the hallowed precedents of this Court has its historical roots in the inception of this Nation. Referring to European refugees, one scholar has observed that the "United States owes its very existence and growth to millions of decisions favoring exit over voice." Albert O. Hirschman, *Exit, Voice, and Loyalty* at 106 (Harvard Univ. Press 1970). Similarly, the American West was settled by pioneers who voted with their feet; the "myth" of going West

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11 New York's highest court has directly addressed the issue of compelled use of private property, and its conclusions differ fundamentally from those of the New Jersey Supreme Court in this matter. In *Seawall v. City of New York*, 542 N.E.2d 1059 (N.Y.), *cert. denied*, 493 U.S. 976 (1989), the New York Court of Appeals invalidated a law that required owners of single-room-occupancy hotels to refurbish and lease units at controlled rents for an indefinite period.

The court found that the law effected an unjust taking, even though it contained a "buy-out" provision allowing owners to escape the requirements of the law by paying a fee of $45,000 per unit. *Id.* at 1065.

The court rejected the City's argument that the buy-out provision saved the law:

> [T]he City . . . is saying no more to the owners than that it will not do something unconstitutional if they pay the City not to do it. But if the initial act amounts to an unlawful taking, then permitting the owners to avoid the illegal confiscation by paying a "ransom" cannot make it lawfu'

Id. at 1069-1070. The fact that the ıd sought to be furthered by the City law—alleviating the problems of ho ıelessness—was acknowledged by the court to be "of the greatest societal importance" did not justify the means employed to achieve it. *Id.* at 1068-1069.

"was of the greatest importance for it provided everyone with a paradigm of problem-solving." *Id.* at 107.

The principle of exit was enshrined in Article IV of the Articles of Confederation. Even though the Articles stressed the role of the individual states, which retained the right to regulate commerce, Article IV specifically provided for the right to exit:

> Article IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union . . . the people of each state shall have free ingress and regress to and from any other state. . . .

The right to ingress and egress has remained virtually unquestioned for more than 200 years. New Jersey itself affirmed the principle in *Sheeran v. Nationwide Mutual Insurance Co.*, 404 A.2d 625, 630 (N.J. 1979) (recognizing that an insurer has right to withdraw from automobile insurance business).

Until recently, the right of exit has represented a major structural safeguard for all of the other liberties guaranteed by the Constitution. It is a natural check on regulatory oppression; it does not require courts to look into details of legislation. When regulation is abusive, citizens may simply leave, and the implicit threat of departure promotes healthy apprehension on the part of state officials who may be contemplating abusive regulatory schemes. *See* Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 150 (1992).

Unfortunately, the recent actions of New Jersey, Massachusetts and other states threaten to erode the natural safeguard of exit. *See, e.g., supra* note 8. The draconian penalties imposed by New Jersey to block Twin City's exit from the State constitute an intentional assault on this venerable right. While the police power may under some circumstances encompass the right to regulate exit in order to further a legitimate state interest, exit should not be barred for the very purpose of eliminating it as a check on oppressive regulation.

The New Jersey Supreme Court acknowledged that "competition among state governments tends to prevent overregulation, offering companies choices in determining those States' regulatory systems to which it will subject its business operations." A-28-29. Nevertheless, that court endorsed a scheme of perpetual economic bondage in order to pay off the $3 billion JUA debt that New Jersey politicians allowed to accumulate over a period of many years.

c. Punishment For Seeking To Exit A State Is Not A Legitimate State Purpose.

New Jersey officials made their coercive and punitive intent clear at the very outset of this controversy. After Twin City attempted to surrender its license, New Jersey's Governor stated in *The New York Times*: "If [Twin City] won't sell us car insurance, we won't let them sell us anything." A-102. As the Governor's statement makes clear, the conditions imposed on exit were patently intended to intimidate Twin City into changing its business decision and to cow corporations that were considering exit into remaining in New Jersey to avoid the fate of Twin City and the Affiliated Corporations.

In upholding these penalties, the New Jersey Supreme Court attempted to downplay—if not to hide—the harsh reality of the oppressive regulatory scheme it condoned. The court held that the State could constitutionally impose conditions, such as property forfeiture, as the means to "discourage" Twin City's withdrawal from the market or to "induce[ ]" other multi-line companies to remain in the market. A-20. Artful language, however, should not be allowed to obscure reality. For all the euphemisms of "discouragement" and "inducement," the New Jersey Supreme Court in fact blessed closure of the State's borders, and endorsed an *in terrorem* scheme of forced servitude in a market that the State dictated must be served.

Viewed as punishment, New Jersey's actions cannot pass constitutional muster. A bare desire "to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528,

534 (1973) (emphasis in original).[12] Harming individuals for conduct that is concededly lawful is particularly offensive to the Constitution. Similarly, "[j]ust as the intentional harming of a group is not a legitimate goal, so too the intentional harming of a group to further some other governmental interest is not a rational means to further that other interest." *Medora v. Colautti*, 602 F.2d 1149, 1155 n.14 (3d Cir. 1979). Punishing the Affiliated Corporations is thus neither a legitimate end in itself nor a permissible means of mandating conduct on the part of Twin City and other companies that might want to leave New Jersey.

2. There Is No Rational Connection Between The Punishments Imposed By New Jersey And The Express Purpose Of The Statute On Which The Punishments Were Based.

In the courts below, Respondent argued that the Order furthers a legitimate public purpose by ensuring, pursuant to FAIRA, the orderly withdrawal of Twin City from the private passenger automobile insurance market. That argument is specious. Respondent's obvious aim was to *prevent* Twin City's exit from this market altogether. A-98. Accordingly, there is no rational connection between the conditions imposed and the averred aim of ensuring Twin City's orderly withdrawal.

The Forfeiture Condition is especially irrational. If, indeed, the purpose of FAIRA is to ensure an orderly withdrawal by automobile insurers, the Forfeiture Condition makes a mockery of that purpose by forcing additional withdrawals and disrupting various markets. There can be no rational nexus between Twin City's desire to exit from selling private passenger insurance and the requirement that seven affiliated corporations forfeit their right to engage in lines of business unrelated to private passenger automobile insurance. This con-

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12 *Moreno* was an equal protection case, but the question of whether a given state purpose is *legitimate*, and whether that purpose is rationally furthered by the state's chosen means, is logically the same whether analyzed under the rubric of equal protection or substantive due process.

dition imposed on the grant of "permission" for Twin City to exit is in effect a denial, not an approval. The Forfeiture Condition is clearly counterproductive because it requires, among other things, that the Affiliated Corporations *stop selling private passenger automobile insurance*. Thus, it even creates instability in the very market that the withdrawal statute purports to protect. This feature of the condition is particularly harmful because it requires one affiliate to terminate coverage for members of the American Association of Retired Persons. In sum, there is simply no rational connection between the Forfeiture Condition and orderly withdrawal. In *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836-837 (1987), this Court recently reaffirmed the need for a nexus between conditions imposed by government and the purpose of regulation under which conditions are imposed. Where, as here, the necessary nexus between the condition and statutory purpose is lacking, the condition becomes nothing less than " 'an out-and-out plan of extortion.' " *Id.* at 837 (citation omitted).

Similarly, the Mandatory New-Business Condition has the potential for severely counterproductive effects. This condition permits Twin City to withdraw only if it takes on large numbers of new policyholders for a period of five years. As a result of this condition, Twin City's automobile policies have multiplied from 15,971 in March of 1990 to 36,627 as of September of 1992. *See* note 5, *supra*. Aside from forcing Twin City to accept enormous new exposure to liability, this condition raises the specter that a much larger group of policyholders will be disrupted when Twin City's withdrawal finally is allowed to occur.

The draconian conditions on exit imposed by New Jersey constitute a national threat to economic liberty and free enterprise. Having been publicly endorsed by the New Jersey Supreme Court, Respondent's unconstitutional restraints on exit represent an attractive option for regulators around the country.[13] Insurance problems in many states have reached cri-

13 Unfortunately, government officials looking for easy solutions have found it difficult to resist the temptation to utilize unconstitutional conditions to disguise coercion as choice. Accordingly, too often in the history of this country government has attempted to infringe a wide variety

sis proportions, *see, e.g.*, notes 8-9, *supra*, and New Jersey's solution undoubtedly will be noticed by regulators looking for a quick fix. Massachusetts already has in place a statutory scheme that permits actions like New Jersey's—and has

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of constitutional rights. Fortunately, this Court has been alert to these schemes and has continuously invalidated them in connection with various constitutional provisions. *See, e.g., Rutan v. Republican Party*, 497 U.S. 62 (1990) (doctrine of unconstitutional conditions used to invalidate political patronage practices under the First Amendment); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (doctrine used to invalidate conditioning permit to rebuild house on property owners' transfer of public easement across beachfront property—Takings Clause); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (doctrine used to invalidate statute forbidding federally funded noncommercial educational broadcasting station from editorializing—First Amendment); *Thomas v. Review Board of The Indiana Employment Sec. Div.*, 450 U.S. 707 (1981) (doctrine used to invalidate denial of unemployment benefits because claimant's religious beliefs forbade participation in production of armaments—First Amendment); *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973) (doctrine used to invalidate amendment to the Food Stamp Act that conditioned eligibility on being a member of a related household—Equal Protection Clause); *Garrity v. New Jersey*, 385 U.S. 493 (1967) (doctrine used to invalidate coerced confessions in criminal proceedings—Fourteenth Amendment); *Sherbert v. Verner*, 374 U.S. 398 (1963) (doctrine used to invalidate eligibility provisions of unemployment compensation statute that denied benefits to claimant who refused employment due to religious beliefs—Free Exercise Clause); *Speiser v. Randall*, 357 U.S. 513 (1958) (doctrine used to invalidate provision of California law that conditioned tax exemption on nonadvocacy of overthrow of the government by unlawful means—Due Process Clause); *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426 (1926) (doctrine used to invalidate New Mexico statute that prohibited a foreign insurance company from paying commissions to nonresidents—Due Process Clause); *Buck v. Kuy-Kendall*, 267 U.S. 307 (1925) (doctrine used to invalidate state statute that prohibited common carriers from using highways without obtaining a permit—Commerce Clause); *Terral v. Burke Constr. Co.*, 257 U.S. 352 (1922) (doctrine used to invalidate Arkansas statute that prohibited foreign corporations from using federal courts); *Union Pac. R.R. Co. v. Public Service Comm'n of Missouri*, 248 U.S. 67 (1918) (doctrine used to invalidate state charge for a certificate authorizing the issue of bonds secured by a mortgage—Commerce Clause).

We submit that it is time once again for this Court to remind the states that deprivation of constitutional rights may not be accomplished behind a smokescreen of "choices."

attempted to use it to prevent insurer withdrawal. Maine has expressly relied on the decision of the New Jersey Supreme Court in this case to support a scheme of capital assessments applied to insurers that wish to exit from the State's workers' compensation morass even though such insurers have never written workers' compensation insurance there. Other states likely will follow the lead of New Jersey, Massachusetts, and Maine, and the rights of corporations to move freely across state lines will be gravely imperiled. We respectfully submit that this Court should send a clear message that oppressive regulation of the freedom of a business to exit a market simply will not be tolerated in New Jersey or anywhere else in the Nation.

II.

This Case Presents An Opportunity (1) To Provide Direction To The States On The Proper Limits Of Regulatory Confiscation, And (2) To Apply The "Categorical Rule" For Providing Compensation For Takings To Cases In Which A State Totally Deprives A Company Of Intangible Property In Order To Coerce The Continuation of Business.

Through a novel scheme of regulatory coercion, Respondent has ordered Petitioners to surrender valuable property with no compensation in violation of the Takings Clause, and the New Jersey Supreme Court mistakenly has approved this wrongful conduct. Absent action by this Court, the people of this Nation are at risk that other states will emulate New Jersey's unconstitutional but bluntly effective tactics whenever they want to solve public problems expediently by foisting them onto private parties.

"The Fifth Amendment guarantees that private property shall not 'be taken for public use, without just compensation.' " *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).[14] Respondent's

14 The Takings Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment. *See, e.g., Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978).

Order violates that guarantee by requiring Twin City to forfeit all of its non-private passenger business in New Jersey (the Other-Business Condition), and by requiring the seven Affiliated Corporations to surrender their entire books of business (the Forfeiture Condition).

When a person's entire property interests have been taken, this Court applies a "categorical" rule and finds that compensation must be provided without further inquiry into specific facts. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). Although the taking in *Lucas* involved real property, Petitioners respectfully submit that the categorical rule should apply in the instant case where the State has totally deprived parties of the value of intangible property—here, Petitioners' respective licenses and businesses in New Jersey and the many millions of dollars in premiums that flow annually from that business.

In *Lucas*, Justice Scalia discussed the justification for applying the categorical rule to cases in which a state precludes all economic use of real property. *Id.* at 2894-2895. His rationale that "total deprivation of beneficial use" is the functional equivalent of a physical taking, *id.* at 2894, applies here where the Forfeiture and Other-Business Conditions obliterate all economic value of Petitioners' commercial property in New Jersey.[15]

Justice Scalia further observed that total deprivations "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious harm." *Id.* at 2895. That observation is precisely the situation at bar: New Jersey seeks to force private passenger automobile insurers to bail out the State's failed JUA by threatening to destroy the property of the Affiliated Cor-

15 The New Jersey Supreme Court's attempt to denigrate property rights by noting that the Affiliated Corporations remained free to sell insurance in *other* states points up its error. The critical issue that the court missed is that the Forfeiture Condition completely destroys the value of the Affiliated Corporations' property in New Jersey and is thus unconstitutional regardless of the existence of property in other states.

porations. The inequitable consequence of this purpose is to shift the burden of the government's mistakes onto the stockholders of insurance companies, who were not responsible for creating the problem. Constitutional protections, however, are intended "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). "To have the state first create the crisis with a set of stringent regulations and then use that crisis to justify still more extensive state regulation is an open invitation for government irresponsibility." Epstein, *supra* at 165.

In 1991, Twin City and the Affiliated Corporations generated $66,859,921 and $192,268,583, respectively, in premiums from doing business in New Jersey's various insurance markets. *See supra* note 4. Absent application of the categorical rule to cases involving the loss of intangible property, an individual who is deprived of a fraction of an acre of land will enjoy greater constitutional protection than an individual who is deprived of millions of dollars in business through the taking of a license. This Court may correct this anomaly by granting this petition for certiorari.

Even without applying the categorical rule to this case, the Forfeiture and Other-Business Conditions result in a taking. This Court has long recognized that when "regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). When, as in this instance, a state destroys property rights through conditions that fail to further the law pursuant to which the conditions are imposed, this Court has deemed those conditions to be an unconstitutional " 'out-and-out plan of extortion.' " *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (citation omitted).

In determining whether regulation "goes too far" in a particular case, this Court considers three factors: (1) the economic impact of the regulation; (2) the extent of interference with "distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Central Transp. Co.*, 438 U.S. at 124 (citation omitted). Should this Court grant

certiorari, Petitioners will demonstrate unequivocally that each of these factors compels a finding of an unjust taking.

The economic impact of the Forfeiture Condition on the Affiliated Corporations and Twin City is devastating. The New Jersey Supreme Court conceded that "the property affected by the regulation is the value of the Twin City affiliates' New Jersey insurance business . . . ," A-28, which in 1991 generated annual premiums of $125,408,662. Likewise, Twin City must surrender non-private passenger automobile premiums that totalled more than $37,228,038 in 1991.[16] Moreover, under the Mandatory New-Business Condition, Twin City projects losses of approximately $100 million during the five years prior to exit, at which point Petitioners will lose all of their business in New Jersey.

Twin City and the Affiliated Corporations have operated in New Jersey for many years. During that period, Petitioners have acquired business licenses, generated valuable good will, compiled valuable customer information, created valuable relationships with related businesses, and otherwise obtained a large bundle of property rights. *See Dugan v. Dugan*, 457 A.2d 1, 6 (N.J. 1983) (goodwill is property); *New Jersey Dep't of Envtl. Protection v. Atlantic States Cast Iron Pipe Co.*, 575 A.2d 895, 901 (N.J. Super. App. Div. 1990) (business licenses are property); *De Vitis v. New Jersey Racing Comm'n*, 495 A.2d 457, 462 (N.J. Super. App. Div.), *cert. denied*, 508 A.2d 213 (N.J. 1985) (business licenses are property). Indeed, under New Jersey law, the very "right of a person to engage in a business of his choice is a property right [that] should be protected against arbitrary interference by the State. . . ." *Lane Distributors Inc. v. Tilton*, 81 A.2d 786, 792-793 (N.J. 1951). The Forfeiture and Other-Business Conditions obliterate all of these valuable property rights. Thus, the "economic impact" of these conditions is stark and strongly points to an unjust taking of Petitioners' property.

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16 The New Jersey Supreme Court failed to consider the impact upon Twin City of the forfeiture of its other business in the State, from which Twin City does not seek to withdraw.

Likewise, Respondent has interfered with Petitioners' reasonable, investment-backed expectations.[17] Twin City and the Affiliated Corporations had operated in New Jersey for many years and had been individually subjected to New Jersey regulations. Suddenly, in 1990, Respondent decided to treat the corporations as one entity. This action directly contradicted Respondent's prior behavior, and veered radically away from prior judicial precedents in the State. For example, at the time Twin City attempted to exit, the State had in place a venerable tradition of respecting the individual identity of separate corporations absent a showing of fraud or deception.[18] Significantly, Respondent has lodged no claim of wrongdoing against either Twin City or any of the Affiliated Corporations. Petitioners, therefore, had a well-grounded expectation that the State would respect their separate corporate identities. In addition, Petitioners reasonably expected to be able to withdraw. The New Jersey Supreme Court specifically had affirmed an insurer's right to surrender its license and withdraw from the automobile insurance business. *Sheeran v. Nationwide Mut. Ins. Co.*, 404 A.2d 625, 630 (N.J. 1979).

Finally, the third factor to be considered—the character of the government's action—also supports a finding of a compensable taking. When government imposes a condition bearing upon property, this Court requires a nexus between the condition and the purpose of the statute or regulation that the

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17 In upholding the Order, the New Jersey Supreme Court unduly emphasized that Twin City should have expected government regulation. A-29. That proposition is self-evident. What Twin City did not expect was regulation that would grossly violate its constitutional rights.

18 The respect accorded to the individuality of separate corporations is well-established in New Jersey's common law. *See Cintas v. American Car & Foundry Co.*, 25 A.2d 418, 421-422 (N.J. Ch.), *aff'd*, 28 A.2d 531 (E. & A. 1942) (New Jersey's then highest court affirmed the opinion that the corporate form should be disregarded "only when it is necessary to do so in order to prevent fraud, deception, evasion or injustice."). *See also State Dep't of Envtl. Protection v. Ventron Corp.*, 468 A.2d 150, 164-165 (N.J. 1983); *Mueller v. Seaboard Commercial Corp.*, 73 A.2d 905, 908 (N.J. 1950) (citing *Irving Investment Corp. v. Gordon*, 69 A.2d 725, 728 (N.J. 1949)).

condition supposedly serves. Without such a nexus, this Court will find a taking. *See Nollan*, 483 U.S. at 836-842.

Here, Respondent imposed the conditions in his Order pursuant to Section 72 of FAIRA, which provides for "an orderly withdrawal from the market and a minimization of the impact of the surrender or discontinuance on the public generally or on the company's policyholders." A-57. As was the case in *Nollan*, the conditions in Respondent's Order are patently unrelated to the stated purpose of the relevant law, namely, orderly withdrawal. The forced surrender of non-private passenger insurance business by Twin City does not protect the public generally but instead creates instability in the affected markets by ousting insurers willing and able to serve them. That the Forfeiture Condition requires the Affiliated Corporations to discontinue writing *private passenger automobile insurance* is absurdly counterproductive because it promotes instability in the very market that Respondent is mandated to protect.

In sum, the Forfeiture and Other-Business Conditions are paradigms of regulation that has "gone too far." Unchecked, the power to regulate has become the power to destroy. By finding New Jersey's action unconstitutional under the Takings Clause, this Court will give the states important direction as to the proper limits of regulation that confiscates intangible property, which in modern life is of paramount importance to the economic well-being of this Nation.

CONCLUSION

For the foregoing reasons, we respectfully urge that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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SUPREME COURT OF NEW JERSEY
A-101 September Term 1991

IN THE MATTER OF THE "PLAN FOR ORDERLY WITHDRAWAL FROM NEW JERSEY" OF TWIN CITY FIRE INSURANCE COMPANY

Argued March 17, 1992 Decided July 29, 1992

On appeal from and on certification to the Superior Court, Appellate Division, whose opinion is reported at 248 N.J. Super. 616 (1991).

Taylor R. Briggs, a member of the New York bar, argued the cause for appellants Twin City Fire Insurance Company, Hartford Fire Insurance Company, Hartford Accident and Indemnity Company, Hartford Casualty Insurance Company, Hartford Underwriters Insurance Company, Hartford Insurance Company of the Midwest, Hartford Insurance Company of Connecticut, New England Insurance Company, Hartford Life and Accident Insurance Company, and Hartford Life Insurance Company (*LeBoeuf, Lamb, Leiby & MacRae*, attorneys; *Mr. Briggs and Wesley S. Caldwell, III*, of counsel; *Mr. Briggs, Mr. Caldwell, Laura B. Barry, James R. Martino* and *Stephen H. Orel*, on the briefs).

Jack M. Sabatino, Assistant Attorney General, argued the cause for respondent Commissioner of Insurance (*Douglas S. Eakeley*, Acting Attorney General of New Jersey,

attorney; *Mr. Sabatino* and *Carol Johnston*, Deputy Attorney General, on the brief).

Elmer M. Matthews argued the cause for *amicus curiae* American Insurance Association (*Clapp & Eisenberg*, attorneys; *Mr. Matthews* and *Frederic S. Kessler*, on the brief).

Deborah T. Poritz submitted a letter in lieu of brief on behalf of *amici curiae* State Farm Mutual Automobile Insurance Company, State Farm Fire and Casualty Company, State Farm General Insurance Company, State Farm Life Insurance Company, and State Farm Annuity and Life Insurance Company (*Jamieson, Moore, Peskin & Spicer*, attorneys).

John J. Degnan, General Counsel, submitted a letter in lieu of brief on behalf of *amici curiae* Chubb Insurance Company of New Jersey, Federal Insurance Company, Vigilant Insurance Company, Pacific Indemnity Company, Great Northern Insurance Company and Chubb Custom Insurance Company.

The opinion of the Court was delivered by

STEIN, J.

Twin City Fire Insurance Company (Twin City) challenges the constitutionality of the order issued by the Commissioner of Insurance (Commissioner) conditioning the termination of its authority to write insurance in New Jersey. Twin City objects primarily to two conditions: the so-called "forfeiture" condition, which requires that the separate corporations affiliated with Twin City as members of the ITT Hartford Group, Inc. (ITT Hartford) surrender their respective certificates of

authority within five years and withdraw from the state; and the so-called "new-business condition," which requires that during its withdrawal from the state over a five-year period Twin City comply with existing laws, including those provisions of the Fair Automobile Insurance Reform Act of 1990, *L.* 1990, *c.* 8 (the Reform Act or the Act) requiring automobile insurers to participate equitably in the shifting of residual-market insureds to the voluntary market. See *N.J.S.A.* 17:30E-14. In a published opinion, the Appellate Division upheld the Commissioner's order except with respect to a modification consented to by the Commissioner eliminating two life- and health-insurance affiliates from the forfeiture condition, but remanded the matter to the Commissioner to afford Twin City the opportunity to have its withdrawal application reconsidered on the basis of regulations adopted subsequent to the Commissioner's order. 248 *N.J. Super.* 616, 641 (1991). We granted Twin City's petition for certification. ____ *N.J.* ____ (1991). We affirm.

I

Twin City is a property-casualty insurer licensed for more than twenty years to transact business in each of the fifty states and the District of Columbia. It has no plan to surrender its license in any jurisdiction other than New Jersey.

Twin City primarily writes private-passenger and commercial automobile insurance in New Jersey. Its 1989 private-passenger insurance premiums aggregated $16.3 million, or 1.032% of that market; its aggregate 1989 commercial-insurance premiums were $49.6 million, representing 13% of the market.

Twin City is a wholly-owned subsidiary of Hartford Fire Insurance Company (Hartford Fire), as are the other six Twin City affiliated companies affected by the Commissioner's order, as modified: Hartford Accident & Indemnity Company; Hartford Casualty Insurance; Hartford Underwriters Insurance Company; Hartford Insurance Company of the Midwest; Hartford Insurance Company of Connecticut; and New England

Insurance Company. ITT Hartford is the parent company of Hartford Fire and, derivatively through Hartford Fire, of Twin City and its six affiliated companies. Twin City and its affiliates market their products collectively under common trade names (The Hartford, The Hartford Insurance Group, and ITT Hartford Insurance Group), through independent insurance agencies appointed generally to represent member companies of ITT Hartford. Claims submitted to Twin City and its affiliates are commonly processed by employees of Hartford Fire pursuant to management agreements between Hartford Fire and its respective subsidiary companies. Twin City and its affiliates participate in reinsurance-pooling agreements with other member companies of ITT Hartford. Hartford Fire and the other six Twin City affiliates generated approximately $120 million in aggregate premiums from New Jersey insurance business in 1989, of which approximately $9 million was attributable to private-passenger automobile premiums and the balance to multiple lines of property and casualty insurance.

On March 7, 1990, Twin City tendered its Certificate of Authority for surrender to the Acting Commissioner of Insurance, accompanied by a letter forecasting that the impending adoption of the Reform Act would cause Twin City to incur "devastating losses in future years." The Reform Act was signed by Governor Florio on March 12, 1990. Section 72 of the Act, which applied retroactively to requests by insurers for surrender of Certificates of Authority submitted on or after January 25, 1990, provides:

> An insurance company of another state or foreign country authorized under chapter 32 of Title 17 of the Revised Statutes to transact insurance business in this State may surrender to the commissioner its certificate of authority and thereafter cease to transact insurance in this State, or discontinue the writing or renewal of one or more kinds of insurance specified in the certificate of authority, only after the submission of a plan which provides for an orderly withdrawal from the market and a minimization of the impact of the surrender or discontinuance on the pub-

> lic generally and on the company's policyholders in this State. The plan shall be approved by the commissioner before the withdrawal or discontinuance takes effect. *In reviewing a plan for withdrawal under this section, the commissioner shall consider, and may require as a condition of approval, whether some or all other certificates of authority issued pursuant to chapter 17 or 32 of Title 17 of the Revised Statutes held by the company or by other companies in the same holding company as the company submitting the plan should be surrendered.* The certificate of authority of the company shall be deemed to continue in effect until the provisions of the approved plan have been carried out. The provisions of this section shall apply to any request for withdrawal, surrender or discontinuance filed on or after January 25, 1990.
>
> [Emphasis added.]

The Acting Commissioner immediately rejected Twin City's attempted surrender of its license, and informed Twin City that no termination could occur until the Commissioner had approved and Twin City had implemented a plan for orderly withdrawal in accordance with Section 72 of the Act. When Twin City declined to submit such a plan, the Department of Insurance (Department) sought and obtained injunctive relief, and Twin City was ordered to rescind notifications of withdrawal it had forwarded to its agents and cease all activities preparatory to termination of its business in New Jersey.

In response, on April 30, 1990, Twin City submitted a plan for orderly withdrawal, effective the following day, in which it proposed to withdraw from private-passenger automobile-insurance business in New Jersey by non-renewing its policies and withdrawing its rating system, retaining the authority to write other forms of insurance in the state. According to the Commissioner's order, Twin City's affiliates simultaneously communicated their intention to withdraw from the private-passenger automobile-insurance market by eliminating their rating systems for that insurance. The sole exception to the

affiliates' proposed withdrawal was an automobile- and homeowners-insurance program offered by Hartford Underwriters Insurance Company to members of the American Association of Retired Persons.

Twin City's rationale for its proposed withdrawal from the private-passenger automobile-insurance market, as explicated in arguments opposing the Department's application for injunctive relief, relied on financial projections prepared by Twin City in anticipation of adoption of the Reform Act. Those projections, prepared on the basis of estimated rate increases of 6.4% in 1990 and 8% in 1991 and 1992, calculated that Twin City would sustain underwriting losses in those three years of $3.8 million, $19 million, and $23.5 million, respectively, if it continued its present private-passenger automobile-insurance business.

In his Administrative Decision and Order of August 14, 1990 (No. A90-151), the Commissioner approved Twin City's plan subject to fourteen conditions. In challenging the Commissioner's Order and the constitutionality of Section 72 of the Reform Act in the Appellate Division, Twin City objected specifically to four of the conditions:

A. The "Five Year Condition"

Twin City must attempt to place its private-passenger automobile business with other insurers. If unsuccessful after five years, Twin City may then issue notices of non-renewal. Twin City cannot withdraw from the market until all of its policies have been placed with other carriers or have expired.

B. The "Other Business Condition"

Twin City shall be required to seek replacement carriers for its other lines of business for a period of five years. After five years Twin City must non-renew any remaining policies in force as they expire.

C. The "Forfeiture Condition"

Twin City's ITT Hartford affiliates must submit orderly plans of withdrawal from their respective markets providing for the termination of their transaction of insurance business within five years.

D. The "New-Business Condition"

During its withdrawal from the private-passenger automobile-insurance business over a five-year period, Twin City must comply with all provisions of the Reform Act including the requirement that it participate proportionately in the shifting of "assigned risk" or residual market insureds to the voluntary market.

The Appellate Division sustained the conditions and upheld the constitutionality of Section 72 of the Act. 248 *N.J. Super.* at 621-42. The court rejected Twin City's contention that the condition requiring Twin City's affiliates to surrender their licenses within five years was an unconstitutional taking of property without just compensation. In the Appellate Division's view, Twin City's affiliates could retain their respective lines of insurance in New Jersey if Twin City continued to write private-passenger insurance. Hence, the only "loss" mandated by the Act was the potential reduction in profits resulting from Twin City's compliance with the residual market depopulation and other provisions of the Reform Act, which the court characterized as " 'a slender reed upon which to rest a takings claim.' " *Id.* at 627 (quoting *Andrus v. Allard*, 444 *U.S.* 51, 66, 100 *S. Ct.* 318, 327, 62 *L. Ed.* 2d 210, 223 (1979)). The court also rejected Twin City's substantive-due-process argument, concluding that Section 72 of the Act and the Commissioner's order constituted a rational response to a private insurer's desire to withdraw from the private-passenger market, reflecting the strong governmental interest in encouraging all companies to share the burden of depopulating the residual market and reducing the cost of private-passenger automobile insurance. *Id.* at 630-38. The court summarily rejected Twin City's

equal-protection and Commerce Clause arguments. *Id.* at 639-40. Finally, the Appellate Division remanded the matter to the Commissioner to permit Twin City to have its withdrawal proposal adjudicated on the basis of the regulations adopted subsequent to the Commissioner's order. *Id.* at 640-41.

II

A. History and Overview of the Reform Act

A basic familiarity with the events and circumstances that prompted passage of the Reform Act, as well as an appreciation of the Act's anticipated impact on the private-passenger automobile insurance market, are essential prerequisites to an informed evaluation of the validity of the Commissioner's order. The Act's background and objectives are described comprehensively in *State Farm Mutual Automobile Insurance Co. v. State*, 124 *N.J.* 32 (1992), in which this Court sustained the constitutionality of the Reform Act against a facial challenge. We revisited the subject in *In re Department of Insurance's Order Nos. A-89-119 and A-90-125*, ____ *N.J.* ____, ____-____ (1992) (slip op. at 7-12), also filed today. Rather than summarize the critical developments that led to the Reform Act, we draw on Justice Handler's careful explanation in our *State Farm* opinion:

> For years, New Jersey's system of automobile insurance regulation, like those of many other states, has faced an intractable problem of providing coverage for high-risk drivers. Prior to 1983, drivers who could not obtain coverage directly from insurers in the voluntary market were insured through an Assigned Risk Plan (*N.J.S.A.* 17:29D-1), under which the Commissioner of Insurance apportioned high-risk drivers among all auto insurers doing business in New Jersey. In 1983, the Automobile Full Insurance Availability Act, *N.J.S.A.* 17:30E-1 through -24, replaced the assigned-risk system with the New Jersey Automobile Full Insurance Underwriting Association,

commonly known as the Joint Underwriting Association or JUA.

All insurers licensed to write automobile insurance in New Jersey were required to be members of the JUA. The objective of the new scheme was to create a more extensive system of allocating high-risk drivers to carriers, and through the JUA, to provide such drivers with coverage at rates equivalent to those charged in the voluntary market. * * *.

The JUA, a good deal more complex than the prior Assigned Risk Plan, worked as follows. Insurers (and subsequently certain qualified non-insurer entities) could apply to become "servicing carriers," which would bear administrative responsibility for collecting premiums, arranging coverage, and the like, and which would receive fees for such services from the JUA. However, the statute, the Plan of Operation, and the agreements between the JUA and servicing carriers all provided that claims and liabilities of the JUA would be borne by it independently; servicing carriers were to be insulated from such claims and liabilities.

Because the JUA insured high-risk drivers but also required that their rates be the same as voluntary-market rates (see *N.J.S.A.* 17:30E-13), it was anticipated that premium revenues would not cover costs of claims against JUA policies. Therefore, in addition to normal premium income, the JUA was also given income from Department of Motor Vehicle surcharges for moving violations and drunken driving convictions, policy "flat charges," and "residual market equalization charges," or RMECs, to be added to policy rates for voluntary-market insureds. *N.J.S.A.* 17:30E-8. Thus, the JUA was a system in which the insurance costs of high-risk drivers were subsidized by the imposition of fees on segments of the general population of motorists. The JUA was supposed to be operated on a no-profit, no-loss basis, with RMECs increased or

decreased as needed to accomplish that result.

However one may view the objectives of the JUA, the system did not achieve its goals. More and more drivers became unable to procure voluntary-market coverage, until by 1988 over 50% of New Jersey drivers had to be insured through the JUA. Claims against JUA insureds were sizeable and greatly exceeded the JUA's available income. Despite the imposition of substantial RMECs from 1988 through 1990, the JUA nonetheless accumulated a deficit of over $3.3 billion in unpaid claims and other losses.

Automobile insurance reform, including the reduction of the cost of insurance, and particularly some plan for eliminating the unwieldy JUA, repaying its debt, and replacing it with a more workable distribution of the automobile insurance market, became a priority for the Legislature and the executive branch in 1990. By March of that year the Reform Act had been adopted.

The principal goals of the Act were to reduce insurance costs for most New Jersey drivers, to depopulate the JUA by switching insureds to the voluntary market, and to create a funding mechanism to pay off the JUA debt. To these ends, the Act provided that the JUA would cease writing or renewing policies as of October 1, 1990. The "depopulation" of the JUA would be accomplished by classifying insured drivers into three categories: (1) high-risk drivers in the (revived) Assigned Risk Plan (10% of the market); (2) "non-standard" risk drivers, who would be insured by private insurers directly, but who could be charged rates up to 135% of those of standard risks (15% of the market); and (3) standard-risk, voluntary-market insureds covered at prevailing rates (the remaining 75% of the market). Presumably, the higher rates now to be charged high-risk and "non-standard" risk drivers should bring the premium income on such coverage in line with

actual costs, and this coverage would no longer be subsidized.

There remains, however, the problem of how to pay off the JUA's prior accumulated debt of over $3.3 billion; this, too, is addressed by the Reform Act. The Act creates the New Jersey Automobile Insurance Guaranty Fund (Auto Fund), a separate fund within the State Treasury, to collect and disburse the various payments designed to pay off the JUA debt. Reform Act, Section 23; *N.J.S.A.* 17:33B-5. The Act assigns to the Auto Fund certain sources of income that under the prior scheme went to the JUA, *e.g.*, surcharges for driving violations and drunken driving convictions. It also creates new sources of revenue for the Auto Fund, *e.g.*, fees on lawyers, doctors, and auto body repair businesses, higher automobile registration fees, and, most significant in the context of this litigation, the imposition of additional assessments and surtaxes on insurers.

The assessments imposed on insurance carriers are collected through the Property Liability Insurance Guaranty Association (PLIGA). Reform Act, Section 74, *N.J.S.A.* 17:30A-8a(9). PLIGA was created in 1974 to impose assessments on New Jersey property-casualty insurers to pay claims against carriers that had become insolvent. (*L.* 1974, *c.* 17; *N.J.S.A.* 17:30A-1 through 17:30A-20). The Reform Act requires PLIGA to make additional assessments to be applied exclusively to the JUA debt. These assessments, denominated by the Act as "loans," are paid into the Auto Fund. *N.J.S.A.* 17:30A-8a(10). They are to be set at rates designed to net $160 million per year for eight years (1990 through 1997); for 1990, the assessments represented 2.7% of net premiums of the property-casualty insurers.

Section 75 of the Reform Act, *N.J.S.A.* 17:30A-16, addresses recoupment from policyholders of PLIGA

assessments both for insolvencies and for the JUA bailout. Insurers have always been permitted to pass through the insolvency assessments to policyholders. The insolvency pass through originally was accomplished by rate increases, but in 1979 the method was changed to direct surcharges on policy premiums. The surcharges for insolvency assessments continue to be authorized under the Reform Act. *N.J.S.A.* 17:30A-16a. However, the Act expressly prohibits such surcharges to recover the new assessments for the JUA bailout. Section 75b states:

> No member insurer shall impose a surcharge on the premiums of any policy to recoup assessments paid pursuant to [the provision requiring assessments to be loaned to the Auto Fund]. [*N.J.S.A.* 17:30A-16b.]

In addition to the new assessments, the Reform Act, Section 76, imposes a special surtax on insurers to go toward the JUA bailout. *N.J.S.A.* 17:33B-49. This surtax is a greater amount, 5% of net premiums, but is imposed for a shorter period (only three years, 1990, 1991 and 1992), than the assessments. The additional surtax is designed to net a total of $300,000,000 over the three-year period into the Auto Fund. Reform Act, Section 77, *N.J.S.A.* 17:33B-50. Because the objective is to secure $300 million in net proceeds, the 5% surtax rate can be adjusted, depending upon the amount of insurers' net premiums. The 5% rate cannot be *exceeded*, and it is theoretically possible that the Director of Taxation could lower the rate; but such a lowering could occur only if automobile insurance net premiums increased significantly, a highly unlikely event given both the supposed premium-reducing effects of the Act and current market conditions. The Reform Act, Section 78, addresses the question of whether the additional surtaxes can be charged to consumers:

> The Commissioner of Insurance shall take such action as is necessary to ensure that private passenger automobile insurance policyholders shall not pay for the surtax imposed pursuant to section 76. [*N.J.S.A.* 17:33B-51.]

[124 *N.J.* at 40-45 at (citations omitted).]

In *State Farm*, the insurers had argued that those provisions of the Reform Act that prohibited the pass through to policyholders of the assessments and surcharges imposed by the Act to pay off the JUA's $3.3 billion indebtedness would necessarily cause the insurers to operate at a loss and thus be deprived of a constitutionally-adequate rate of return. We noted, however, that Section 2g of the Act, *N.J.S.A.* 17:33B-2g, which had been added by an amendment introduced when the Reform Act was before the Assembly Appropriations Committee, specifically provided that "insurers 'are entitled to earn an adequate rate of return' " through the ratemaking process. 124 *N.J.* at 57-58. We also observed that "emergency regulations" adopted by the Commissioner while the *State Farm* litigation was pending established a new procedure to afford rate relief to insurers that could demonstrate that payment of the surtaxes and assessments had denied them a fair rate of return. *Id.* at 59-61. Hence, we rejected the facial challenge to the constitutionality of the Reform Act because we were satisfied that the regulatory provisions for rate relief and the legislative assurance of a fair rate of return demonstrated that the passthrough prohibitions of Sections 75 and 78 of the Act "do not necessarily preclude all insurers from earning a fair rate of return." *Id.* at 61-62. We also note in passing our recent interpretation of the statutory flex-rate-increase provisions, *N.J.S.A.* 17:29A-44, which allow insurers to raise rates without prior regulatory approval. We held that the Commissioner's statutory authority to modify the statewide average rate change does not authorize any reduction in the three-percentage-point rate increase authorized by statute. *Department of Ins.'s Order Nos. A-89-119 and A-90-125*, *supra*, ____ *N.J.* at ____ (slip op. at 2).

B. The Commissioner's Order

The thirty-five page Administrative Decision and Order issued by the Commissioner includes a thorough explanation for the imposition of severe conditions on Twin City's proposed withdrawal. The Commissioner observed generally that New Jersey's private-passenger automobile-insurance market is undergoing "transition and adjustment," primarily because of the burdens imposed on insurers by the Reform Act. The Commissioner noted that a precipitous withdrawal by Twin City would disrupt market stability, and that a gradual withdrawal would allow the voluntary market sufficient time to absorb Twin City's business while simultaneously "adjusting to the reforms imposed by the * * * Act." The Commissioner also observed that Twin City's application could not be considered in a vacuum, citing thirty-two other pending requests for withdrawal submitted since adoption of the Act, and noting that insurers that historically had profited from New Jersey business should be "prevented from leaving * * * in a hasty or disorderly manner."

Concerning the forfeiture condition, the Commissioner preliminarily emphasized the intensity of insurance regulation in New Jersey and the necessity that he use his regulatory authority to discourage non-renewal of large blocks of business as a component of his regulatory control over market entry and exit. The Commissioner expressed concern that Twin City's withdrawal would exacerbate the difficulty of absorbing insureds from the residual market, a burden that the Reform Act contemplated would be shared by all insurers in order to resolve "a severe crisis in automobile insurance in this State." He implied that Twin City and its affiliates sought to avoid their share of the obligations imposed by the Act while enjoying the benefits of marketing other highly-profitable lines of insurance. The Commissioner pointed out that Twin City's automobile-insurance business historically had been profitable on a national basis, that he assumed that Twin City's automobile business would continue to be profitable under the Reform Act, and that he did not accept Twin City's assertion that its

automobile business would be unprofitable. He also cited Twin City's failure to have applied for a prior approval rate increase since 1988, and its decision not to avail itself of a flex-rate increase for 1989 or 1990. The Commissioner also noted that Twin City could not attribute its planned withdrawal to a hazardous financial condition. The Commissioner observed that if Twin City and its affiliates preferred withdrawal from the private-passenger automobile insurance business, and as a corollary the abandonment of the obligations imposed on all insurers by the Reform Act, then ITT Hartford could not reasonably expect to maintain more-profitable lines of business in New Jersey.

The Commissioner also expressed the view that because continuation of private-passenger automobile insurance is "uniquely in the public interest," the requirement that Twin City's affiliates withdraw from other lines of business would make that business available to other insurers who will be enabled to enhance their profitability. He predicted that the availability of such other business, resulting from the mandated withdrawal of Twin City's affiliates, would encourage existing companies to remain in and would attract new companies to New Jersey's private-passenger automobile-insurance market.

III

Before us, Twin City and *amicus curiae*, American Insurance Association, have focused their challenge to the Commissioner's order on two of the fourteen conditions, the "forfeiture condition," requiring Twin City's affiliates to terminate business in New Jersey within five years, and the "new-business condition," which requires Twin City during its withdrawal from New Jersey to comply with the Reform Act and participate equitably in the shift of residual-market insureds to the voluntary market. They attack the new-business condition as a violation of substantive due process, and the forfeiture condition as denying the affiliated companies the equal protection of the laws and as an unconstitutional taking of property with-

out just compensation. *Amicus* also asserts that the forfeiture condition violates the Commerce Clause of the United States Constitution, as well as the so-called "unconstitutional conditions" doctrine. We address each of the arguments in turn.

A. Substantive Due Process

Although Twin City limits its due-process argument to the new-business condition, apparently conceding the validity under due-process principles of the forfeiture condition, our analysis is sufficiently broad to embrace both conditions. Our decisions have established, as have those of the United States Supreme Court, that "a state statute does not violate substantive due process if the statute reasonably relates to a legitimate legislative purpose and is not arbitrary or discriminatory. * * * [I]f a statute is supported by a conceivable rational basis, it will withstand a substantive due process attack." *Greenberg v. Kimmelman*, 99 *N.J.* 552, 563 (1985) (citations omitted). We described the proper function of the courts in this area in *Hutton Park Gardens v. Town Council*, 68 *N.J.* 543 (1975):

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it."
>
> [*Id.* at 562 (quoting *Nebbia v. New York*, 291 *U.S.* 502, 537, 54 *S. Ct.* 505, ____, 78 *L. Ed.* 940, 957 (1934)).]

Accord Duke Power Co. v. Carolina Envtl. Study Group, 438 *U.S.* 59, 82-84, 98 *S. Ct.* 2620, ____, 57 *L. Ed.* 2d 595, 617-18 (1978); *Usery v. Turner Elkhorn Mining Co.*, 428 *U.S.* 1, 15, 96 *S. Ct.* 2882, ____, 49 *L. Ed.* 2d 752, 766 (1976); *Ferguson v. Skrupra*, 372 *U.S.* 726, 730-32, 83 *S. Ct.* 1028, ____, 10 *L. Ed.*

2d 93, 97-98 (1963); *Williamson v. Lee Optical*, 348 *U.S.* 483, 488, 75 *S. Ct.* 461, ____, 99 *L. Ed.* 563, 572 (1955).

In assessing the constitutionality of Section 72 of the Reform Act and of the conditions imposed by the Commissioner pursuant to its authorization, we observe at the outset that insurance is "a business to which the government has long had a 'special relation.' " *California State Auto. Ass'n v. Maloney*, 341 *U.S.* 105, 109, 71 *S. Ct.* 601, ____, 95 *L. Ed.* 788, 792 (1951). The principle that "the insurance business is strongly affected with a public interest and therefore properly subject to comprehensive regulation in protecting the public welfare" is long settled and well-established. *Sheeran v. Nationwide Mut. Ins. Co.*, 80 *N.J.* 548, 559 (1979).

In the context of the broad and comprehensive regulatory authority of the state over the business of insurance and the tolerant standard by which due-process challenges to such regulation must be addressed, we find no merit in Twin City's contention that the new-business condition violates its due-process rights. Viewed against the backdrop of New Jersey's chronic difficulties in assuring coverage for substandard private-passenger automobile insureds, the justification for imposing that condition on Twin City's right to withdraw is not merely rational, it is compelling. To the extent Twin City's contention addresses the obligation to renew existing policies during its five-year withdrawal process, that obligation is hardly an onerous one. As it withdraws over a five-year period, Twin City must either place its existing policies with other carriers or renew them in order that its insureds not be disadvantaged by its withdrawal. We sustained an analogous be requirement in *Sheeran, supra*, 80 *N.J.* at 561, and entertain no doubt about its reasonableness or its validity.

We are also convinced that due process is not offended by the Commissioner's requiring Twin City to comply, during its withdrawal period, with the Reform Act's mandate that the shift of insureds from the residual to the voluntary market be shared equitably by all insurers. As long ago as 1951 the United States Supreme Court upheld against a due-process

challenge a California statute authorizing that state's insurance commissioner to approve "a reasonable plan for the equitable apportionment" among insurers of substandard risk drivers. *California State Auto. Ass'n*, *supra*, 341 *U.S.* at 107, 110-11, 71 *S. Ct.* at , ____, 95 *L. Ed.* at 791, 793. New Jersey's extraordinary difficulties with assigned-risk drivers, resulting in the JUA's staggering deficit, provoked the Reform Act's mandatory residual-market depopulation provisions. *State Farm*, *supra*, 124 *N.J.* at 41-42. Because the Act requires all insurers to participate equitably in the shift from the residual to the voluntary market, see *N.J.S.A.* 17:30E-14, the Commissioner's imposition of that statutory obligation as a condition of Twin City's withdrawal is not only rational and fair but virtually required by the Act. That an insurer who enjoyed profitable operations during the pre-Reform Act period could abandon entirely the remedial burdens imposed by the Act on all private-passenger insurers would be inequitable. Twin City's obligation to participate in depopulation of the residual market is limited to five years or such shorter period within which it places its policies with other carriers. The new-business condition does not violate due process.

We are equally convinced that, although not asserted as a due-process violation, the forfeiture condition does not violate the due-process rights of Twin City and its affiliates in ITT Hartford. In its challenge to the forfeiture condition as an unconstitutional taking of property without just compensation, see *infra* at ____-____ (slip op. at 27-37), Twin City protests that the Commissioner had no regulatory basis for ignoring the separate corporate status of its affiliates by requiring the termination of their New Jersey business as a condition of Twin City's withdrawal. Although the United States Supreme Court has acknowledged that the "rationality" standard determinative of substantive-due-process challenges to State regulation is less stringent than the "takings" standard, which requires that the taking "substantially advance" the State interest to be achieved, *Nollan v. California Coastal Comm'n*, 483 *U.S.* 825, 834 n.3, 107 *S. Ct.* 3141, ____, n.3, 97 *L. Ed.* 2d 677, 688 n.3 (1987),

both tests focus on the strength of the connection between the government's objective and its regulatory action. By either standard, Twin City's interrelationship with its affiliates is indisputably sufficient to justify a regulatory approach that treats them pragmatically as a single entity.

Twin City's own Plan of Withdrawal establishes that ITT Hartford owns and controls Hartford Fire and, in turn, owns and controls Twin City and its other affiliates. The companies market their products under common names, use the same insurance agents designated for them by ITT Hartford, process their claims collectively through employees of Hartford Fire, and participate in reinsurance-pooling agreements with other ITT Hartford companies. At oral argument, counsel acknowledged that ultimately the decision whether Twin City and the affiliates would remain or withdraw from New Jersey would be made by ITT Hartford's management. Whether Twin City and its affiliates operate as divisions of a single corporation or as subsidiary corporations of an integrated insurance holding company, a responsible regulator could hardly ignore their common ownership and operational interdependence.

Although the Reform Act unquestionably renders more burdensome and less profitable the private-passenger automobile-insurance business in New Jersey, our decision in *State Farm* determined that the Act contemplates that insurers will earn a fair return, and it thus cannot facially be construed to deny insurers a fair rate of return. 124 *N.J.* at 62. Twin City's decision to withdraw apparently reflects the unwillingness of ITT Hartford to subject Twin City to what may be a difficult and burdensome regulatory process. The option of Twin City's withdrawal, however, would be unavailable to ITT Hartford if the affiliates were divisions under common ownership rather than subsidiaries under common control.

As the Commissioner's order observed, the withdrawal of any private-passenger insurers in the current difficult regulatory climate increases the burdens on those insurers who remain, burdens attributable to the more favorable regulatory conditions enjoyed by Twin City before the passage of the

Reform Act. Other private-passenger insurers have also sought withdrawal, following Twin City's example. In such a period of regulatory turmoil and uncertainty, nothing short of severe regulatory measures imposed on private-passenger insurers threatening to withdraw—in other words, strong medicine—would be effective. If the forfeiture condition discourages withdrawal, a substantial State interest—retention of private-passenger insurers—will have been advanced. If it fails to discourage Twin City's withdrawal, the availability for acquisition of its affiliates' insurance business may operate as an inducement to other multi-line carriers to remain in New Jersey, thereby advancing an analogous and equally substantial State interest.

Twin City's reluctance to assert a substantive due-process challenge to the forfeiture condition rather persuasively demonstrates the strength of the regulatory interest advanced by that condition. We hold that that regulatory interest is more than adequate to sustain the forfeiture condition against a substantive-due-process challenge. That the forfeiture condition also " 'substantially advance[s]' the 'legitimate state interest' sought to be achieved," *Nollan*, *supra*, 483 *U.S.* at 834 n.3, 107 *S. Ct.* at n.3, 97 *L. Ed.* 2d at 688 n.3 (quoting *Agins v. Tiburon*, 447 *U.S.* 255, 260, 100 *S. Ct.* 2138, ____, 65 *L. Ed.* 2d 106, 112 (1980))—the *Nollan* Court's governmental-interest test for takings—is also self-evident from our analysis. See *infra* at ____ (slip op. at 37).

B. Equal Protection

Twin City argues first that Section 72 of the Reform Act and the Commissioner's application of the license forfeiture condition denies it equal protection of law because "[i]nsurers that are not licensed to write private passenger auto insurance and are not affiliates of companies authorized to write such insurance do not have to write private passenger auto insurance as a condition of retaining their licenses" Furthermore, Twin City charges that it is the victim of irrational disparate treatment by the Commissioner. It claims that Crum and Forster Insurance

Co. was permitted to withdraw from the private-passenger automobile-insurance market by transferring its business to another insurer without its affiliates forfeiting their licenses. It also claims that two subsidiaries of the CIGNA holding company system were permitted to withdraw without any forfeiture of the licenses of other CIGNA affiliates.

The Appellate Division rejected Twin City's first contention, holding that the distinction between companies already in the private-passenger automobile-insurance market and those that did not provide such insurance was "obviously related to a legitimate state interest." 248 *N.J. Super.* at 639 (citing *New Orleans v. Dukes*, 427 *U.S.* 297, 303, 96 *S. Ct.* 2513, 2516, 49 *L. Ed.* 2d 511, 516-17 (1976) (upholding ordinance prohibiting vendors selling foodstuffs from pushcarts in the French Quarter, but exempting vendors selling in French Quarter for eight years or more)). We are fully in accord with the Appellate Division's determination. The test for the distinction challenged by Twin City is whether the classification is rationally related to some legitimate government purpose. *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 *U.S.* 648, 668, 101 *S. Ct.* 2070, ____, 68 *L. Ed.* 2d 514, 530-31 (1981); *Greenberg, supra*, 99 *N.J.* at 567 (if right not fundamental, the government regulation will receive more-relaxed standard of judicial review); *Joseph H. Reinfeld, Inc. v. Schieffelin & Co.*, 94 *N.J.* 400, 411 (1983). Although a different regulatory choice could have been made, to place the burden of depopulating the residual market on insurers currently writing private-passenger automobile insurance surely is a regulatory determination sufficiently reasonable to withstand an equal-protection challenge.

Nor is there an equal-protection violation established by the Commissioner's determination not to impose Section 72 conditions on Crum & Forster and CIGNA, whose withdrawals from the New Jersey private-passenger automobile market were part of a nationwide withdrawal from that market. The Commissioner rationally could conclude that an insurer withdrawing nationally from the private-passenger automobile mar-

ket was not motivated by an intention to avoid the burdens of the depopulation and other provisions of the Reform Act and therefore should not be subjected to the conditions imposed on Twin City. Because we are satisfied that plausible reasons support the distinction in the regulatory treatment accorded to Crum & Forster and CIGNA, we have no doubt that the imposition of the forfeiture and new-business conditions on Twin City does not deny it equal protection of the laws. See *U.S. Const.* amend. XIV, § 1.

C. Commerce Clause

In response to the contention that Section 72 of the Reform Act violates the Commerce Clause, the Appellate Division stated:

> We also reject the various arguments advanced by *amicus* that Section 72 violates the commerce clause. By enactment of the McCarran-Ferguson Act, 15 *U.S.C.S.* § 1011 *et seq.*, Congress has expressly left to the states the regulation of the insurance business. Its purpose is to "give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 *U.S.* 408, 429, 66 *S. Ct.* 1142, 1155, 90 *L. Ed.* 1342, 1360 (1946).
>
> [248 *N.J. Super.* at 639-40.]

We are in accord with the Appellate Division's disposition of the Commerce Clause issue.

D. The Takings Issue

Twin City's principal contention before us is that the forfeiture condition, requiring its affiliates to forfeit their licenses and transfer their New Jersey insurance business to competitors, constitutes an unconstitutional "taking" of its property for public use without just compensation. *U.S. Const.* amend. V; *N.J. Const.* art. I, ¶ 20. It argues that the Appellate Division, in addressing the "takings" issue, improperly focused on the

losses Twin City would incur if it remained in New Jersey rather than on its affiliates' forced surrender of approximately $120 million in aggregate annual-premium income in the event Twin City elects to surrender its license.

As the United States Supreme Court has recently observed, "takings" cases can generally be divided into two distinct categories: cases in which the government takes title to or physically occupies property, generally requiring that compensation be paid; and cases in which the government regulates the permitted uses of property, which require fact-specific determinations on whether compensation is mandated. *Yee v. City of Escondido*, 503 *U.S.* ____, ____, 112 *S. Ct.* 1522, ____, 118 *L. Ed.* 2d 153, 162 (1992). "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government * * * than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central Transp. Co. v. New York City*, 438 *U.S.* 104, 124, 98 *S. Ct.* 2646, 2659, 57 *L. Ed.* 2d 631, 648 (1978). Concerning the second class of cases, the Court observed:

> But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. See, e.g., Penn Central Transp. Co. v. New York City, 438 US 104, 123-125, 57 L Ed 2d 631, 98 S Ct 2646 (1978). The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.
>
> [*Id.* at ____, 112 *S. Ct.* at ____, 118 *L. Ed.* 2d at 162.]

As a general proposition, the Supreme Court has recognized that the "Fifth Amendment's guarantee * * * [is] designed to

bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 *U.S.* 40, 49, 80 *S. Ct.* 1563, ____, 4 *L. Ed.* 2d 1554, 1561 (1960). Nevertheless, the Court consistently has refrained from proposing or adopting rigid or precise principles for determining when a compensable taking has occurred, favoring instead a "highly nonformal, open ended, multi-factor balancing method." Frank Michelman, *Takings*, 1987, 88 *Colum. L. Rev.* 1600, 1621 (1988). As Justice Brennan acknowledged in *Penn Central*, *supra*, 438 *U.S.* 104, 98 *S. Ct.* 2646, 57 *L. Ed.* 2d 631, the Court has simply

> been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. See Goldblatt v. Hempstead, 369 US 590, 594, 8 L Ed 2d 130, 82 S Ct 987 (1972). Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."
>
> [*Id.* at 124, 98 *S. Ct.* at 2459, 57 *L. Ed.* 2d at 648 (quoting *United States v. Central Eureka Mining Co.*, 357 *U.S.* 155, 168, 78 *S. Ct.* 1097, ____, 2 *L. Ed.* 2d 1228, 1236 (1958)).]

Nevertheless, as a guide to the *ad hoc* inquiry implicated by regulatory "takings" claims, the Court has identified three factors as having particular significance: the character of the governmental action, the economic impact of the regulation, and whether the regulation interfered with reasonable investment backed expectations. See *Kaiser Aetna v. United States*, 444 *U.S.* 164, 175, 100 *S. Ct.* 383, ____, 62 *L. Ed.* 2d 332, 343 (1979); *accord Connolly v. Pension Benefit Guar. Corp.*, 475 *U.S.* 211, 224-25, 106 *S. Ct.* 1018, ____, 89 *L. Ed.* 2d 166, 178-

79 (1986); *Penn Central, supra*, 438 *U.S.* at 124, 98 *S. Ct.* at ____, 57 *L. Ed.* 2d at 648.

Before evaluating those critical factors in the context of the forfeiture condition, we observe preliminarily that Twin City's "takings" claim is somewhat incongruent with the Supreme Court's application of its regulatory "takings" doctrine. That application heretofore has been concentrated almost exclusively on governmental regulations restricting use of tangible property, usually some form of real estate, as opposed to regulations that interfere with or diminish only the profits of a business enterprise. See, *e.g.*, *Lucas v. South Carolina Coastal Council*, No. 91-453, 1992 WL 142517 (U.S. June 29, 1992) (holding that State regulation barring all construction on barrier island residential lots constitutes taking requiring compensation unless common-law principles would have prohibited all habitable or productive improvements on lots); *City of Escondido, supra*, 503 *U.S.* ____, 112 *S. Ct.* 1522, 118 *L. Ed.* 2d 153 (holding that mobile-home rent-control ordinance was not physical "taking" under Fifth Amendment when viewed in context of California statute restricting termination of mobile-home park tenancy); *Nollan, supra*, 483 *U.S.* 825, 107 *S. Ct.* 3141, 97 *L. Ed.* 2d 677 (holding that condition of permit to construct residence requiring grant of public easement across beach-front section of private property constituted taking of property without just compensation); *First Lutheran Church v. Los Angeles County*, 482 *U.S.* 304, 107 *S. Ct.* 2378, 96 *L. Ed.* 2d 250 (1987) (holding that regulation completely depriving owner of property use entitles owner to compensation for period prior to determination that regulation was compensable "taking" under Fifth Amendment); *Hodel v. Irving*, 481 U.S. 704, 107 *S. Ct.* 2076, 95 *L. Ed.* 2d 668 (1987) (holding that federal statute barring inheritance of highly-fractionated Indian-land allotments and providing for escheat to tribe constituted taking of decedent's property without just compensation); *Keystone Coal v. DeBenedictis*, 480 *U.S.* 470, 107 *S. Ct.* 1232, 94 *L. Ed.* 2d 472 (1987) (holding that Pennsylvania statute restricting mining operations to prevent subsidence damage did

not constitute "taking" of property under Fifth Amendment); *Agins v. Tiburon*, 447 *U.S.* 255, 100 *S. Ct.* 2138 65 *L. Ed.* 2d 106 (1980) (holding that municipal zoning ordinances rezoning private residential property and allowing one to five single-family residences on five-acre tract did not constitute taking without just compensation); *Kaiser, supra*, 444 *U.S.* 164, 100 *S. Ct.* 383, 62 *L. Ed.* 2d 332 (1979) (holding that government's requirement of public access to marina joined to bay due to private development of inland lagoon constituted exercise of eminent-domain power, requiring payment of compensation); *Penn Central, supra*, 438 *U.S.* 104, 98 *S. Ct.* 2646, 57 *L. Ed.* 2d 631 (holding that application of New York City's Landmark Preservation Law, preventing use of air space above Grand Central terminal, did not constitute taking of private property without just compensation).

In a handful of cases involving regulatory "takings" of commercial property interests other than land, the Court generally has been reluctant to conclude that compensation was required. See *Connolly, supra*, 475 *U.S.* 211, 106 *S. Ct.* 1018, 89 *L. Ed.* 2d 166 (1987) (holding that provisions of federal law requiring that employer withdrawing from multi-employer pension plan pay proportionate share of plan's unfunded vested benefits in contravention of plan's contribution requirements did not constitute compensable taking; Court noted that government had taken nothing for its own use but had merely nullified contractual limitation by imposing additional obligations, consistent with congressional power, on withdrawing employers); *Ruckelshaus v. Monsanto Co.*, 467 *U.S.* 986, 104 *S. Ct.* 2862, 81 *L. Ed.* 2d 815 (1984) (holding that EPA's disclosure of post-1978 pesticide data did not constitute taking of property, although pesticide producer had property interest protected by takings clause of Fifth Amendment in health, safety, and environmental data submitted to federal government); *Andrus, supra*, 444 *U.S.* 51, 100 *S. Ct.* 318, 62 *L. Ed.* 2d 210 (holding that ban on sale of avian Indian relics existing before species of birds whose parts were used in relics became protected by federal law did not constitute compensable taking, noting that

owners retained right to possess, transport, donate, and devise affected property); *Miller v. Schoene*, 276 *U.S.* 272, 48 *S. Ct.* 246, 72 *L. Ed.* 568 (1928) (holding that Virginia statute requiring owner of ornamental cedar trees to destroy trees to avoid infecting adjacent apple orchards with cedar rust did not constitute compensable taking of property); *Hadacheck v. Sebastian*, 239 *U.S.* 394, 36 *S. Ct.* 143, 60 *L. Ed.* 348 (1915) (holding that municipal ordinance prohibiting brickmaking within designated area did not constitute compensable taking of property containing valuable clay deposits that could not feasibly be relocated to alternative site for brickmaking purposes); *Mugler v. Kansas*, 123 *U.S.* 623, 8 *S. Ct.* 273, 31 *L. Ed.* 205 (1887) (holding that Kansas statute prohibiting manufacture and sale of intoxicating liquors did not constitute compensable taking of claimant's brewery erected before statute was enacted); *see also* Joseph L. Sax, *Takings and the Police Power*, 74 *Yale L.J.* 36, 63 (1964) (proposing that economic losses imposed by government acting in its arbitral or regulatory capacity be treated as non-compensable exercise of police power); William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *Yale L.J.* 694, 708 (1985) (observing that intent of drafters of "takings" clause was to limit application to physical takings).

Against that context of decisional law, we consider the specific factors generally emphasized in regulatory "takings" cases. We emphasize that application of those factors necessarily involves a balancing of the private interests affected by the regulation against the public interests that are advanced. See *Agins*, *supra*, 447 *U.S.* at 260-61, 100 *S. Ct.* at ____, 65 *L. Ed.* 2d at 112. We have already elaborated on the character of the governmental action, *supra* at ____-____ (slip op. at 21-24), noting that the forfeiture condition was a forceful but relevant regulatory measure imposed to advance the substantial State interest in discouraging Twin City's withdrawal from the private-passenger automobile market, as well as the State's interest in encouraging other multi-line carriers to continue in that market. The regulatory crisis in New Jersey's private-

passenger automobile-insurance market supports and enhances the reasonableness of and necessity for strong regulatory measures to promote market stability while the planned depopulation of the residual market is implemented.

The second factor, the economic impact of the regulation, emphasizes the potential significance of the financial loss that the Twin City affiliates may sustain if Twin City ceases to operate in New Jersey. We note preliminarily that because the property affected by the regulation is the value of the Twin City affiliates' New Jersey insurance business, we have no occasion to consider application of those decisions involving real property that categorically find a compensable taking when a regulation "denies all economically beneficial or productive use of land." *See, e.g., Lucas, supra*, 1992 WL 142515 at *6. The record indicates that the affiliates' businesses generate aggregate annual premiums of $120 million and that those businesses are generally profitable, although no estimate of lost profits has been presented. The record does not indicate whether the affiliates could sell or otherwise receive compensation from other insurers interested in succeeding to lines of business written by one or more of Twin City's affiliates. We take for granted, however, that the surrender by Twin City's affiliates of their respective licenses would not necessarily result in the elimination of all commercial value inherent in the affiliates' New Jersey business operations, some aspects of which undoubtedly could be applied to business in other states. Nevertheless, we cannot speculate on whether, conceding the significant economic loss that the affiliates would sustain if forced to surrender their New Jersey markets, ITT Hartford would be able to recoup that loss by expanding its marketing efforts in other states with a less-restrictive regulatory climate. At least one commentator has noted that competition among state governments tends to prevent overregulation, offering companies choices in determining those States' regulatory systems to which it will subject its business operations. See Vicki Bean, *"Exit" as a Constraint on Land Use Exactions:*

Rethinking the Unconstitutional Conditions Doctrine, 91 *Colum. L. Rev.* 473, 508-09 (1991).

The third factor, whether the regulation interfered with reasonable investment-backed expectations, lends itself to either side of the argument. On the one hand, Twin City would undoubtedly acknowledge the strong, well-recognized governmental interest in regulating the business of insurance. See *Sheeran*, *supra*, 80 *N.J.* at 559. Moreover, the Appellate Division observed that Twin City and its investors

> had fair warning that the Legislature would link appellants' licenses to write other lines of insurance with their continuing to write private passenger automobile policies. In his 1987 veto message of Senate Committee Substitute for Senate Bill No. 2318 and Assembly Bill No. 2404, Governor Kean specifically called for legislation similar to Section 72:
>
> > We need to say to insurance companies that before they quit doing business in New Jersey in one line of insurance, they must be able to show that they are doing so for a good reason. If not, the Insurance Commissioner must have the power to require the company's licenses for all lines.
> >
> > * * * *
> >
> > The language that I am recommending to be added includes reasonable limits on the authority of the Insurance Commissioner to require the surrender of other licenses in the holding company system of the company wishing to withdraw from our State.
>
> [248 *N.J. Super.* 628-29.]

On the other hand, no such "linkage" had previously been imposed on affiliated companies writing insurance in different New Jersey markets, and to that extent the implementation of the forfeiture condition may not have been anticipated by Twin City.

On balance, we are fully satisfied, considering the specific factors ordinarily emphasized in regulatory "takings" analysis in the context of existing and developing "takings" jurisprudence, and weighing the compelling public interest against the private interests adversely affected, that no compensable taking of property under either the Federal or State Constitutions is implicated by the forfeiture condition. We consider that condition to be more in the nature of a regulatory limitation on Twin City's right to abandon its responsibilities in the private-passenger automobile market than a "taking" of its affiliates' property for public use. As in *Connolly*, *supra*, 475 *U.S.* at 224, 106 *S. Ct.* at ____, 89 *L. Ed.* 2d at 178, the State has taken none of the affiliates' businesses for its own use; rather, it has terminated the affiliates' authority to do business as a condition of Twin City's withdrawal. That Twin City's affiliates will lose profits because of the restriction imposed by the Commissioner does not give rise to a compensable taking of property, in view of our conclusion that the underlying regulation is valid. *Supra* at ____-____ (slip op. at 21-24). Moreover, we have already determined that the objective of the forfeiture condition is sufficiently related to the State's regulatory power to supervise Twin City's withdrawal from the market as to satisfy the enhanced standard set forth in *Nollan*, *supra*, 483 *U.S.* at 834 n.3, 103 *S. Ct.* at ____ n.3, 97 *L. Ed.* 2d at 688 n.3, that the "taking" substantially advance the State interest to be achieved. *Supra* at ____ (slip op. at 22). We also have carefully considered the public interest served by the forfeiture condition in the context of the economic impact of that condition on Twin City's affiliates and the extent to which it interferes with their investment-back expectations. Although the economic impact is potentially quite severe, we are thoroughly persuaded that the public interest advanced by the regulation substantially outweighs its adverse effect on ITT Hartford. Accordingly, we find no merit in Twin City's contention that the forfeiture condition imposes a compensable taking of its affiliates' property.

Finally, we address and reject the contention of *amicus*, American Insurance Association, that Section 72 of the Act and

the forfeiture condition imposed by the Commissioner's order violate the so-called "unconstitutional conditions" doctrine, relying on *Nollan*, *supra*, 483 *U.S.* 825, 107 *S. Ct.* 3141, 97 *L. Ed.* 2d 677. That doctrine holds generally "that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 *Harv. L. Rev.* 1413, 1415 (1989). Prior to *Nollan*, the unconstitutional conditions doctrine was not generally identified with "takings" jurisprudence. See Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 *Sup. Ct. Rev.* 1, 34-35 ("[*Nollan*] thus introduces, perhaps for a first time, the vexed doctrine of unconstitutional conditions into the law of eminent domain.").

However, the unconstitutional-conditions doctrine does not necessarily preclude the imposition of conditions on "the exercise of a constitutional right." *Id.* at 35; *see, e.g., Lyng v. International Union*, 485 *U.S.* 360, 108 *S. Ct.* 1184, 99 *L. Ed.* 2d 380 (1988) (holding that Federal statute providing that household otherwise eligible for food stamps cannot become participant in program or receive increased allotment if member of household is on strike because of labor dispute not an unconstitutional restriction of striker's rights under First and Fifth Amendments); *Maher v. Roe*. 432 *U.S.* 464, 97 *S. Ct.* 2376, 53 *L. Ed.* 2d 484 (1977) (upholding under Equal Protection Clause condition imposed by State welfare program that generally subsidized medical expenses incidental to pregnancy but limited benefits for first trimester abortions to those found "medically necessary"); *Republican Nat'l Comm. v. Federal Election Comm'n*, 487 *F. Supp.* 280 (S.D.N.Y.) (upholding provision of presidential public financing law conditioning eligibility for public financing on compliance with spending limits, notwithstanding candidates' First Amendment right to make unlimited campaign expenditures), *aff'd*, 445 *U.S.* 955, 100 *S. Ct.* 1639, 64 *L.Ed.* 2d 231 (1980). Thus, the critical inquiry is "which conditions may be attached to what privileges and why." Epstein, *supra*, 1987 *Sup. Ct. Rev.* at 35.

We need not, however, explore the limits of the unconstitutional-conditions doctrine in view of our determination that the forfeiture condition is not otherwise unconstitutional, having heretofore concluded that that condition did not violate principles of due process, *supra* at ____-____ (slip op. at 21-24), equal protection, *supra* at ____ (slip op. at 26), or taking without just compensation, *supra* at ____-____ (slip op. at 27-37). Based on those determinations, we are satisfied that the unconstitutional-conditions doctrine is inapplicable to Twin City's contention that Section 72 of the Act and the forfeiture condition are invalid.

We affirm the judgment of the Appellate Division.

Chief Justice Wilentz and Justices Clifford, Handler, Pollock, O'Hern, and Garibaldi join in this opinion.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-114-90T5

IN THE MATTER OF THE "PLAN FOR ORDERLY WITHDRAWAL FROM NEW JERSEY" OF TWIN CITY FIRE INSURANCE COMPANY

Argued March 26, 1991 Decided June 11, 1991

Before Judges Brody, Gruccio and D'Annunzio.

On appeal from New Jersey Department of Insurance.

Wesley S. Caldwell, III, argued the cause for appellants Twin City Fire Insurance Company, *et al.* (LeBoeuf, Lamb, Leiby & MacRae, attorneys; Mr. Caldwell, of counsel and on the brief).

Jack M. Sabatino, Assistant Attorney General, argued the cause for respondent New Jersey Department of Insurance (Douglas S. Eakeley, Acting Attorney General, attorney; Mr. Sabatino, of counsel; Stephen P. Tasy and Carol Johnson, Deputy Attorneys General, on the brief).

Elmer M. Matthews argued the cause for *Amicus Curiae* American Insurance Association (Clapp & Eisenberg, attorneys; Mr. Matthews, Frederic S. Kessler and Harvey C. Kaish, on the brief).

The opinion of the court was delivered by

BRODY, J.A.D.

The Legislature enacted the Fair Automobile Insurance Reform Act of 1990, *L.* 1990, c. 8 (Reform Act), to reduce the high cost of mandatory passenger automobile insurance. Among the strategies for accomplishing this goal, the Reform Act provides for phasing out what the Legislature identified as an unnecessary component of that high cost: maintaining the New Jersey Automobile Full Insurance Underwriting Association, commonly known as the Joint Underwriting Association or JUA. The JUA had been legislatively created with the expectation that it would be a fairer alternative to the assigned-risk plan that had provided insurance at higher premiums to drivers rejected by private passenger automobile insurers as bad risks. However, by the time the Reform Act was enacted in 1990, the JUA had amassed a debt of 3.3 billion dollars, despite subsidies derived from annual assessments on private passenger automobile insurance policies, and had accumulated a population of insureds numbering more than one-half of all New Jersey drivers.

The Reform Act provides for retiring the JUA debt by various means including assessing the New Jersey Property-Liability Guaranty Association 160 million dollars a year for seven years and imposing a 5% surtax on private passenger automobile insurance premiums, payable by the insurers, for three years. The Reform Act does not permit insurers to pass through to their policyholders the cost of either the assessments or the surtaxes.

The Reform Act also provides for replacing the JUA with the former assigned-risk plan for bad drivers, who will again pay higher premiums but whose numbers are to be limited to no more than 10% of all New Jersey drivers. This depopulation of the JUA and cap on the number of assigned risk drivers is to be accomplished over a two-year period by requiring private passenger automobile insurers to lower their standards for writing policies in the voluntary market. For a full history of the JUA and a description of the statutory program for shifting the bulk

of its drivers to the voluntary market *see I/M/O Assignment of Exposures to the Aetna Casualty and Surety Company*, ____ *N.J. Super.* ____, ____-____ (App. Div. 1991), slip op. at pp. 3-7 (May 20, 1991).

Some private passenger automobile insurers have sought to avoid the burdens of bailing out and depopulating the JUA by attacking the constitutionality of these statutory provisions and by attempting to withdraw from the New Jersey private passenger automobile insurance market. So far the Commissioner of Insurance has stymied insurers' attempts to withdraw from the market by invoking the provisions of Section 72 of the Reform Act, *N.J.S.A.* 17:33B-30 (hereafter Section 72), that are designed to discourage and delay withdrawal.

The Supreme Court has held that despite the statutory prohibition against passing through the cost of the assessments and surtaxes to their policyholders, insurers may nevertheless obtain relief in particular cases through the rate-making process in order to assure a constitutionally-required fair rate of return. *State Farm Mutual Insurance Co. v. State*, ____ *N.J.* ____ (1991) (May 16, 1991). This appeal is concerned solely with the constitutionality of Section 72 and the lawfulness of the Commissioner's implementation of its provisions respecting Twin City Fire Insurance Company and its affiliates in the ITT Hartford Group holding company (referred to collectively as appellants), all of whom are foreign insurers authorized to write insurance in New Jersey by *N.J.S.A.* 17B:23-1. Appellants' arguments are supported and augmented by the arguments of *amicus* American Insurance Association. Except as noted, we will not distinguish between the arguments of appellants and *amicus*.

Twin City writes about 1% of all New Jersey private passenger automobile policies. It also writes commercial vehicle insurance in this State. Its Hartford affiliates write substantial amounts of other lines of casualty and liability insurance in this State. A week before the Reform Act was enacted on March 12, 1990, Twin City attempted to surrender to the Commissioner its license to write private passenger automobile insurance in New Jersey and sought permission to issue nonrenewal notices to its

policyholders. The Commissioner, relying on the withdrawal provisions of Section 72, which include a provision rendering Section 72 retroactive to January 25, 1990, issued an order for orderly withdrawal containing several conditions that Twin City must meet before its withdrawal becomes effective.

Appellants object to four of the conditions, relevant portions of which appear in footnotes that follow. One condition requires Twin City to place its private passenger automobile policyholders with other insurers before issuing notices of nonrenewal. If Twin City is unsuccessful in making these placements within five years, it may then issue notices of nonrenewal. Its withdrawal from the market does not become effective until all its policies have expired.[1] A second condition simply makes it clear that Twin City, as a private passenger automobile insurer, must continue to comply with all insurance laws, including the JUA bailout and depopulation provisions of the Reform Act, until its withdrawal becomes effective.[2] A third

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1 The condition provides:

Twin City shall be required to seek for a period of no more than five years after the date of this Division and Order, a replacement carrier or carriers acceptable to the Commissioner for its New Jersey private passenger automobile insurance business. If Twin City is successful in placing all of its insureds with such other carriers prior to expiration of this five-year period, and if Twin City's New Jersey liabilities and potential liabilities [footnote omitted] have been fully satisfied prior to expiration of this five-year period, then Twin City's Certificate of Authority shall be surrendered and its authority to write business in New Jersey shall be terminated as of the date that these requirements have been fulfilled. If at the end of the five-year period, Twin City has not succeeded in finding replacement coverage for all of its insured, Twin City may nonrenew its remaining policies in-force as the policies expire.

2 The condition provides in relevant part:

[Twin City] shall comply with all other appropriate laws as amended by the FAIR Act which are not inconsistent with this Decision and Order, specifically including but not limited to the following:

a. *N.J.S.A.* 17:33B-15 regarding mandatory availability and issuance of automobile insurance coverage;

b. *N.J.S.A.* 17:33B-25 prohibiting an insurer from refusing to issue or renew automobile insurance;

c. *N.J.S.A.* 17:33B-9 regarding mandatory assignment of producers; and

condition requires Twin City to stop writing commercial vehicle insurance.[3] The fourth condition requires all other members of the ITT Hartford Group to stop writing the lines of insurance that they sell in New Jersey.[4]

The statutory authority for imposing these conditions is purportedly found in Section 72, which provides:

> An insurance company of another state or foreign country authorized under chapter 32 of Title 17 of the Revised Statutes to transact insurance business in this State may surrender to the commissioner its certificate of authority and thereafter cease to transact insurance in this State, or discontinue the writing or renewal of one or more kinds of insurance specified in the certificate of authority, only after the submission of a plan which provides for an

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d. *N.J.S.A.* 17:30E-14 and *N.J.S.A.* 17:33B-11 regarding residual market depopulation quotas and sharing of profits and losses related to residual market business.

3 The condition provides:

With respect to all of its other lines of business, Twin City shall be required to seek, for a period of no more than five years after the date of this Decision and Order, a replacement carrier or carriers acceptable to the Commissioner. Upon either placing all of its other business with an acceptable replacement carrier or the expiration of five years, whichever is sooner, Twin City shall nonrenew its remaining other insurance business in-force as the policies expire.

4 The condition provides in relevant part:

All of Twin City's property and casualty and life and health affiliates within ITT Hartford Group, Inc. shall surrender their respective Certificates of Authority for amendment immediately upon approval of Twin City's plan, so the Department can limit and restrict the use of each affiliates's certificate to the . . . lines of insurance it currently writes in New Jersey. Twin City's property and casualty and life and health affiliates shall submit to the Commissioner for approval their respective Plans of Orderly Withdrawal within 60 days after receipt of the Decision and Order. In particular, the Plan of Withdrawal for Hartford Underwriters Insurance Company shall include its homeowners and automobile insurance program for members of the American Association of Retired Persons (AARP). Those Plans of Withdrawal shall provide for the termination of the transaction of insurance business in New Jersey no later than five years from the date of approval of the plans of withdrawal by the Commissioner, as the affiliates' policies expire, after which time the Certificates of Twin City's affiliate companies will be indefinitely suspended. . . .

> orderly withdrawal from the market and a minimization of the impact of the surrender or discontinuance on the public generally and on the company's policy holders in this State. The plan shall be approved by the commissioner before the withdrawal or discontinuance takes effect. In reviewing a plan for withdrawal under this section, the commissioner shall consider, and may require as a condition of approval, whether some or all other certificates of authority issued pursuant to chapter 17 or 32 of Title 17 of the Revised Statutes held by the company or by other companies in the same holding company as the company submitting the plan should be surrendered. The certificate of authority of the company shall be deemed to continue in effect until the provisions of the approved plan have been carried out. The provisions of this section shall apply to any request for withdrawal, surrender or discontinuance filed on or after January 25, 1990.

We reject appellants' arguments that Section 72 is unconstitutional, and, with one exception, its arguments that the Commissioner unlawfully implemented Section 72 in this case.

I.

We turn first to the arguments that Section 72 is unconstitutional.

Before discussing each particular argument, we hold that the Section 72 provision that renders Twin City's affiliates subject to the Commissioner's order is not defective simply because the affiliates are separate corporate entities. Twin City has acknowledged that it and its affiliates are "under common management" of "the parent insurance company, Hartford Fire Insurance Company," which in turn is owned by the ITT Hartford Group. When considering whether the Legislature may constitutionally respond to a problem in the private passenger automobile insurance market by limiting appellants' business in other lines, it is not legally significant that appellants chose to write those other lines through separate corpo-

rate entities having common owners rather than writing all their lines through one corporate entity.

A.

Appellants' first argument is that by authorizing the Commissioner to bar Twin City and its affiliates from writing other lines of insurance as the price for permitting Twin City to withdraw from the private passenger automobile insurance market, Section 72 authorizes unconstitutional takings of property without just compensation. The Fifth Amendment of the United States Constitution and the New Jersey Constitution, *N.J. Const. of 1947*, art. I, para. 20, expressly provide that private property shall not be taken for public use without just compensation. "The protections afforded under both constitutions are coextensive." *Littman v. Gimello*, 115 *N.J.* 154, 161 (1989), *cert. denied*, ____ *U.S.* ____, 107 *L.Ed.* 2d 314 (1989).

Applied to this case, the constitutional prohibition raises questions of whether appellants' licenses to write other lines of insurance are private property and whether requiring appellants to choose between surrendering those licenses and writing private passenger automobile insurance constitutes a taking. We need not decide whether appellants' licenses to write other insurance are private property protected by the taking clauses because the choice given appellants by Section 72 does not constitute a "taking."

The United States Supreme Court has identified the factors that must be considered to determine whether a governmental regulation limiting the use of private property so destroys its value as to constitute a taking. There was no taking when the City of New York, in order to preserve Grand Central Station as a landmark, prohibited its owners from topping it with a high-rise office structure. *Penn Central Transp. Co. v. New York City*, 438 *U.S.* 104, 57 *L.Ed.* 2d 631 (1978), *reh'g denied* 439 *U.S.* 883, 58 *L.Ed.* 2d 198 (1978). That opinion requires us to make "essentially ad hoc, factual inquiries" involving factors of "particular significance":

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. [Citation omitted.] So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government [citation omitted] than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. [438 *U.S.* at 124.]

Accord Connolly v. Pension Benefit Guaranty Corp., 475 *U.S.* 211, 224-225, 89 *L.Ed.* 2d 166, 179 (1986) (sustaining federal government's authority to compel employers to make additional contributions to a federal fund guaranteeing payment of private pension funds).

We first examine the character of the governmental action. Requiring appellants to discontinue writing all other lines of insurance as the price for discontinuing to write private passenger automobile insurance cannot be characterized as a "physical invasion." Rather it is part of "a public program adjusting the benefits and burdens of economic life to promote the public good."[5] Thus, as was the case in *Penn Central* and *Connolly*, the action may not "readily be found" to be a taking.

Appellants rely on *Nollan v. California Coastal Commission*, 483 *U.S.* 825, 97 *L.Ed.* 2d 677 (1987), where the Court found that there was a taking. The case is distinguishable because there the State's action was a physical invasion, the taking of a public easement over the owner's real property.[6] When the character of the governmental action "is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto v.*

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5 In our later consideration of the "due process" issue, we will discuss whether Section 72 does "promote the public good."

6 The facts of *Nolan* will be discussed below in more detail.

Teleprompter Manhattan CATV Corp., 458 *U.S.* 419, 434-435, 73 *L.Ed.* 2d 868, 882 (1982) (New York City ordinance compelling landlords to allow cable T.V. hookups constitutes a physical invasion that was therefore a taking); *Kaiser Aetna v. United States*, 444 *U.S.* 164, 62 *L.Ed.* 2d 332 (1979) (government regulation compelling owner to allow public to use marina constitutes a physical invasion and was therefore a taking).

Appellants contend that the economic impact of having to give up writing other lines of insurance is the complete destruction of their other-lines business, which generated premiums of about 280 million dollars in 1989. We disagree. Section 72 does not require appellants to give up their other-lines business unless they choose to do so by voluntarily giving up their private passenger automobile line. Appellants' losses, if any, from choosing to continue to write private passenger automobile insurance, the choice Section 72 is designed to encourage, would be the reduction of profits that the JUA bailout and depopulation provisions of the Reform Act might cause. Such losses are not takings. The "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim." *Andrus v. Allard*, 444 *U.S.* 51, 66, 62 *L.Ed.* 2d 210, 223 (1979).

Appellants also claim that Section 72 "has interfered with distinct investment-backed expectations," a kind of economic impact identified by *Penn Central* as evidence of a taking. Their argument, however, does not go beyond complaining of the loss of their other-lines business. Interference with distinct investment-backed expectations does not occur whenever there is a loss of expected profits. *See State Farm Mutual*, *supra*, slip op. at pp. 16-18. It occurs only when the government has made a specific promise to induce investment in an enterprise and then later, after investments have been made in reliance on that promise, the government reneges.

For instance, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 81 *L.Ed.* 2d 815 (1984), federal law required Monsanto, a manufacturer of pesticides, to submit research data, developed at great expense, to a federal regulatory agency. The federal act

contained assurances that data submitted after 1972 would not be disclosed to competitors. A 1978 amendment limited the period of nondisclosure to ten years. The Court found that government disclosures of data submitted from 1972 to 1978 defeated Monsanto's reasonable investment-backed expectations and therefore constituted a taking. 467 *U.S.* at 1013, 81 *L.Ed.* 2d 839. However, the Court concluded that there were no takings before 1972 and after 1978 because, except for the period between those dates, the government had made no promise that the data would be kept secret.

Appellants do not claim that by enacting Section 72 the Legislature reneged on a prior promise, relied upon their investors, that appellants could freely leave the private passenger automobile insurance market while continuing to write other lines of insurance. On the contrary, for years appellants' investors knew that appellants were engaged in a heavily regulated business whose private passenger automobile insurance premiums were generally considered too high. Any significant statutory reform aimed at reducing those premiums would almost certainly contain provisions to discourage insurers from leaving the private passenger automobile insurance market.

More particularly, appellants' investors had fair warning that the Legislature would link appellants' licenses to write other lines of insurance with their continuing to write private passenger automobile policies. In his 1987 veto message of Senate Committee Substitute for Senate Bill No. 2318 and Assembly Bill No. 2404, Governor Kean specifically called for legislation similar to Section 72:

> We need to say to insurance companies that before they quit doing business in New Jersey in one line of insurance, they must be able to show that they are doing so for a good reason. If not, the Insurance Commissioner must have the power to require the company's licenses for all lines.
>
> * * * *
>
> The language that I am recommending to be added includes reasonable limits on the authority of the

> Insurance Commissioner to require the surrender of other licenses in the holding company system of the company wishing to withdraw from our State. . . .

The long-term regulatory environment in the pesticide industry prompted the *Monsanto* Court to determine that governmental disclosures of data submitted before 1972, when there were no governmental assurances of non-disclosure, did not constitute takings:

> . . . [A]bsent an express promise, Monsanto had no reasonable, investment-backed expectation that its information would remain inviolate in the hands of EPA. In an industry that long has been the focus of great public concern and significant government regulation, the possibility was substantial that the Federal Government, which had thus far taken no position on disclosure of health, safety, and environmental data concerning pesticides, upon focusing on the issue, would find disclosure to be in the public interest. [467 *U.S.* at 1008-1009, 81 *L.Ed.* 2d at 836]

We conclude that the provisions of Section 72 that authorize the Commissioner to require appellants to cease writing other lines of insurance if they choose to withdraw from the private passenger insurance market do not authorize an unconstitutional taking.

B.

Even though Section 72 does not have the effect of authorizing compensable takings, it does authorize the Commissioner to impose restrictions on appellants' business that will result in losses of their property. Appellants contend that those restrictions deprive them of property without due process.[7] We disagree.

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7 The United States Constitution provides in pertinent part, "nor shall any State deprive any person of life, liberty or property, without due process of law." *U.S. Const.* amend. XIV, § 1. Our Supreme Court follows the same standards developed by the United States Supreme Court under the federal

1.

Appellants first argue that the restrictions authorized by Section 72 are irrational and arbitrary. They premise the argument on a narrow view of Section 72's purpose. As they see it, the purpose of Section 72 is simply to ease the voluntary withdrawal of private passenger automobile insurers from the market. They argue from this premise that Section 72's provisions are irrational and arbitrary because they not only authorize the Commissioner to delay an insurer's withdrawal, but also authorize the Commissioner to require a withdrawing insurer to accept new business instead of shedding the business it has.

The purpose of Section 72, seen in the context of its place in the Reform Act, is obviously far broader. The Act itself identifies the Act's underlying purpose: to reduce the cost to the public of private passenger automobile insurance. "Not only has the cost of the insurance product itself escalated, but the subsidies that most drivers contribute to support the financially-troubled New Jersey Automobile Full Insurance Underwriting Association [JUA] have made the system a burden, rather than a benefit, to citizens of the State." *N.J.S.A.* 17:33B-2d. The overall means for correcting the problem are set forth in *N.J.S.A.* 17:33B-2h, which provides in relevant part:

> h. To that end, the Legislature declares that it is in the public interest to:
>
> * * * *
>
> (2) eliminate, over time, the current residual market mechanism, the New Jersey Automobile Full Insurance Underwriting Association, and certain market subsidies currently funding its losses;
>
> (3) provide, through the appointment of an insolvency trustee, for the orderly evaluation, prioritization and satisfaction of obligations payable on behalf of the association;

Constitution for resolving due process claims under the New Jersey Constitution. ***State Farm Mutual, supra***, slip op. at p. 14.

(4) provide, through assessments on property-casualty insurers . . . for the funding of the debts and obligations of the association;

(5) create a new residual market mechanism in which insurers will share directly in the risk of insuring the "bad driver";

(6) guarantee that "good drivers" secure motor vehicle insurance coverage in the voluntary market and control the apportionment of drivers in the residual market; . . .

The Legislature has concluded that these objectives cannot be attained without the continued presence in the market of private passenger automobile insurers to carry a large part of the burden of bailing out and depopulating the JUA while continuing to provide mandatory insurance coverage to New Jersey drivers. As stated in Section 72, a private passenger automobile insurer's plan of withdrawal must provide "a minimization of the impact of the surrender or discontinuance on the public generally and on the company's policyholders in this State." Thus the due process question is whether Section 72 strikes a rational balance between a private passenger automobile insurer's desire to withdraw from the market and the public's need for it to remain in the market to share the burden of bailing out and depopulating the JUA and to continue to provide coverage to its policyholders and other applicants.

Courts presume statutes to be constitutional and sparingly exercise the power to invalidate them. *Jordan v. Horsemen's Benevolent & Protective Ass'n.*, 90 *N.J.* 422, 433 (1982). To overcome the presumption of constitutionality, "the burden is on one complaining of a due process violation to establish if the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 *U.S.* 1, 15, 49 *L.Ed.* 2d 752, 766 (1976). *See also Hutton Park Gardens v. West Orange Town Council*, 68 *N.J.* 543, 562-565 (1975).

The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and

> the right to conduct a business, or to pursue a calling, may be conditioned.

Nebbia v. New York, 291 *U.S.* 502, 527-528, 78 *L.Ed.* 940, 951-952 (1934). Generally, it is up to the Legislature, not the courts, "to decide whether a statute bears too heavily upon" a business and thereby violates due process. *Ferguson v. Skrupa*, 372 U.S. 726, 729, 10 *L.Ed.* 2d 93, 96 (1963).

> So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote a public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied.

Nebbia, supra, 291 *U.S.* at 537, 78 *L.Ed.* at 957. *Accord Williamson v. Lee Optical of Oklahoma*, 348 *U.S.* 483, 99 *L.Ed.* 563 (1955).

Courts have been particularly circumspect when reviewing legislative regulation of the insurance industry because it affects the vital interests of the general public. "It is well established that the insurance business is strongly affected with a public interest and therefore properly subject to comprehensive regulation in protecting the public welfare." *Sheeran v. Nationwide Mutual Ins. Co., Inc.*, 80 *N.J.* 548, 559 (1979). The principle that the Legislature has broad discretion in adopting police power regulations to promote what it sees as the public welfare "is peculiarly apt when the business of insurance is involved—a business to which the government has long had a 'special relation.' " *California State Automobile Insurance Ass'n v. Maloney*, 341 *U.S.* 105, 109-110, 95 *L.Ed.* 788, 792 (1951). As summarized in a leading treatise:

> A state has the unquestioned power to regulate insurance companies and the method of conducting that kind of

> business. The business of insurance is considered not to be merely a private right, but a matter of public concern—a franchise subject to regulation by the state for the public good. And in such regulation, the legislatures are considered to have large powers and wide discretion.

19 *Appleman, Insurance Law and Practice*, § 10321 at 1-3 (1982).

Appellants essentially concede that it is rational for the Legislature to authorize the Commissioner to prevent the precipitous withdrawal of an automobile insurer from the market. It follows that the Commissioner may condition such withdrawal upon the insurer's placing its policyholders with other insurers, unless that cannot be accomplished within a reasonable period. The dispute on this point is whether five years is a reasonable period[8] and whether it is reasonable to require that until the insurer has withdrawn, it be required to write new business and otherwise comply with the provisions of the Reform Act to which automobile insurers staying in the market are subject.

As we previously noted, Section 72 authorizes the Commissioner to require that plans of withdrawal not only protect the insurer's "policyholders in this State" but also protect "the public generally." The Commissioner concluded that the public would suffer if Twin City does not continue to bear its share of the burden of bailing out and depopulating the JUA until the withdrawal becomes effective. The Commissioner found this to be

> necessary in order to provide for an orderly private passenger automobile insurance market over the next several years, during which time the transition to the market structure contemplated in the FAIR Act will occur. Requiring Twin City to accept its duties and obligations as any other private passenger automobile insurer will facil-

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8 The maximum period actually exceeds five years because at the expiration of that period the carrier is only authorized to send its policyholders notices of nonrenewal. The withdrawal is not effective until its policies have expired.

> itate that transition process. Any exemption for Twin City from these obligations would simply transfer them to other insurers, increasing their burdens and making the period of transition even more difficult.

It is neither irrational nor arbitrary to require an insurer to discharge the legal obligations imposed on competing insurers until such time as it withdraws from the market.

The five-year period is not irrationally long. Although it is not certain how long it will take the private passenger automobile insurance market to stabilize after discharging the JUA debt and assimilating its population, it is certain that the process could not go forward unless insurers remain in the market for years to absorb those burdens. We were told at oral argument that dozens of other insurers have applied for withdrawal. It is not for us to second-guess either the Legislature or the Commissioner as to the length of time that will be necessary to allow the process to run its course. *Dougherty v. Human Services Dept.*, 91 *N.J.* 1, 6 (1982).

We turn to anti-eviction legislation for an apt analogy. A landlord, the operator of a business providing a vital public service, may not withdraw his property from the rental market without giving substantial notice. For instance, in order to evict a senior citizen, the notice may be as long as 40 years. *N.J.S.A.* 2A:18-61.23. In upholding the constitutionality of that lengthy period, our Supreme Court identified the underlying legislative economic and social policy of protecting elderly tenants. The Court said, "Our cases have consistently affirmed the high degree of deference appropriate to evaluating the Legislature's chosen means of enhancing economic and social welfare." *Edgewater Inv. Associates v. Borough of Edgewater*, 103 *N.J.* 227, 235 (1986).

2.

It is neither irrational nor arbitrary to condition appellants' licenses to write other lines of insurance, including Twin City's license to write commercial vehicle insurance, on Twin City's continuing to write private passenger automobile insurance. In

reshaping its argument in terms of due process, *amicus* returns to *Nollan v. California Coastal Commission*, *supra*, 483 *U.S.* 825, 97 *L.Ed.* 2d 677, to argue that a state may not exact the surrender of a constitutional right as consideration for the favorable exercise of governmental discretion. The argument requires a closer look at the facts in *Nollan*.

Public beaches were on either side of the Nollans' beachfront property. They wanted to replace a small dilapidated bungalow on their property with a three-bedroom house. California required them to obtain a permit from the California Coastal Commission to erect the larger building. The Commission agreed to issue the permit only if the Nollans allowed the public to use their property to get from one of the public beaches to the other.

The Court held that conditioning the issuance of the permit on the Nollans' "agreeing" to let the public use their property was a thinly disguised public taking of an easement over their land. It acknowledged that if the Commission had exacted a concession from the Nollans more closely related to its authority to regulate the bulk of the proposed building, such a concession would not be a taking. However, because the "same governmental purpose" was not served by issuing the permit and exacting the easement, the Commission's conditional issuance of the permit was "an out-and-out plan of extortion" requiring that compensation be paid for the easement. *Id.* at 837, 97 *L.Ed.* 2d at 689, (quoting *J.E.D. Associates, Inc. v. Atkinson*, 121 *N.H.* 581, 584 (1981), *overruled on other grounds Town of Auburn v. McEvoy*, 553 *A.*2d 317 (1988)). In terms of due process, the holding is an example of the principle that a state "may not condition a privilege which it may deny altogether on a surrender of constitutional right." *Kutcher v. Newark Housing Authority*, 20 *N.J.* 181, 188-189 (1955). *Accord Frost v. California Railroad Comm'n*, 271 *U.S.* 583, 70 *L.Ed.* 1101 (1926).

Amicus likens the Commissioner's authority to regulate Twin City's withdrawal from the private passenger automobile insurance market to the California Coastal Commission's authority to regulate the size of the Nollans' house, and likens the

Commissioner's assertion of authority under Section 72 to compel appellants to stop writing other lines of insurance to the Coastal Commission's assertion of authority to exact an easement from the Nollans without paying just compensation. In effect *amicus* argues that even if the Commissioner's action is not a taking, it is nevertheless "an out-and-out plan of extortion" and therefore violates due process. However, neither *amicus* nor appellants have submitted authority to support their contention that an insurance carrier has a constitutional right to stop writing one of its lines because it has become less profitable, where that line is vital to the public welfare.

In sustaining the constitutionality of legislation that compels automobile insurers to renew policies, the Court in *Sheeran*, *supra*, said that the statute reflected "a clear legislative intent that companies which choose to write automobile policies in the state maintain their fair share of coverage." 80 *N.J.* at 557. Elsewhere, courts have sustained legislation compelling insurers to provide related coverage. *Health Ins. Ass'n of America v. Harnett*, 44 *N.Y.*2d 302, 376 *N.E.*2d 1280, 1284-1285, 405 *N.Y.S.*2d 634, 639 (1978) (health insurers must provide maternity coverage). *Cf.*, *New Hampshire-Vermont Health Service v. Whaland*, 119 *N.H.* 886, 410 *A.*2d 642 (1979) (statute compelling Blue Cross to provide insurance for mental disorders does not violate due process or commerce clause).

Appellants rely on a case that prohibits a state from requiring general liability insurers to write insurance covering medical malpractice claims. *Hartford Accident & Indemnity Co. v. Ingram*, 290 *N.C.* 457, 226 *S.E.*2d 498 (1976). The court held that the public need for such insurance does not justify conscripting insurers to enter a specialized field in which they have had no experience:

> While the State may, and does, require one desiring to engage in the business of writing insurance against liability for personal injury or property damage to obtain a license, the State may not, as a condition to the issuance such license, require the applicant to engage and carry on an entirely different kind of business.

226 *S.E.*2d at 507. The case does not help appellants because Section 72 merely seeks to encourage appellants to continue writing the line of private passenger automobile insurance that Twin City has been writing in New Jersey for years.

Appellants also rely on *People ex rel. Lewis v. Safeco Ins. Co.*, 98 *Misc.*2d 856, 414 *N.Y.S.*2d 823 (Sup. Ct. 1987), which held that insurers could not be denied permission to give up writing all their lines of insurance after sustaining continuing losses writing automobile insurance. The Court held that simply because insurance carriers had licenses to do business in a state "does not mean that they must be forever in bondage, subject to such control." *Id.* at 830. The case is distinguishable for two reasons. Here, appellants do not want to give up writing all lines of insurance and *State Farm Mutual*, *supra*, assures them a fair return.

We have found no case that has considered whether a state violates an insurer's constitutional right to due process by requiring it to surrender its license to write all lines of insurance if it chooses to stop writing private passenger automobile insurance. However, one court has held, albeit without elaboration, that a state may constitutionally suspend an insurer's license to sell profitable lines of insurance until it has complied with mandatory renewal requirements applicable to its line of automobile insurance. *Maryland Casualty Co. v. Commissioner of Ins.*, 372 *Mass.* 554, 363 *N.E.*2d 1087 (1977).

Although the precise issue before us is novel, it has been recognized that a state may constitutionally require the provider of a vital public service to provide that service to a part of its market, which, standing alone, is not profitable. *See e.g. Continental Air Lines, Inc. v. Dole*, 784 F.2d 1245, 1251 (5th Cir. 1986) (airline may be compelled to operate one small route at a loss for a limited period of time).

Dictum in *Penna. Reading S.S. Lines v. Bd. of Pub. Utility Com'rs*, 5 *N.J.* 114, 126 (1950), is also apt. The Court there held that the then Board of Public Utility Commissioners could not compel a railroad in financial straits to continue service on an unprofitable branch line that was little used and was paralleled by a well-used bus route:

> If the situation were such that the branch line was serving a real public need of passengers or the railroad as a whole was making a profit although this particular branch was operating at a loss, the problem would be an entirely different one; in either of these events, to order the railroad to continue service might not be arbitrary and unreasonable in view of all the circumstances. But here the branch line serves no public need for passenger service and not only the branch line but the entire railroad has been operating at a loss for a considerable number of years.

Here, writing private passenger automobile insurance is serving a real public need and neither appellants nor Twin City claims to be operating at a loss. We are satisfied that Section 72 does not overstep the constitutional bounds of due process by requiring appellants to continue to write less profitable private passenger automobile insurance as a condition to writing other more profitable lines of insurance.

3.

Appellants next argue that the retroactive feature of Section 72 denies them due process. It will be recalled that Twin City had submitted its application of withdrawal a week before the Reform Act became effective on March 12, 1990. Section 72 provides that it applies to any request for withdrawal "filed on or after January 25, 1990," the date that Governor Florio proposed the Reform Act to a joint session of the Legislature.

A statute may constitutionally be made retroactive, and "[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Pension Benefit Guaranty Corp. v. Gray & Co.*, 467 *U.S.* 717, 729, 81 *L.Ed.* 2d 601, 611 (1984). *See also Edgewater Inv. Associates v. Borough of Edgewater*, *supra*, 103 *N.J.* at 238. The retroactive feature of Section 72 serves the legitimate legislative purpose of preventing private passenger

automobile insurers from racing to withdraw from the market before the effective data of the Reform Act.

C.

We reject appellants' argument that Section 72 denies them the equal protection of the laws. *U.S. Const.* amend. XIV, § 1. They contend that Section 72 requires them to give up profitable lines of casualty insurance because they are unwilling to continue to write private passenger automobile insurance whereas no such penalty is imposed on casualty insurers not affiliated with private passenger automobile insurers. The distinction is obviously related to furthering a legitimate state interest. *New Orleans v. Dukes*, 427 *U.S.* 297, 303, 49 *L.Ed.* 2d 511, 516-517 (1976). The Legislature has reasonably chosen to support the private passenger automobile insurance market by inducing insurers already in that market to continue to write that line of insurance.

We need not consider whether the Legislature should have or legally could have supported the private passenger automobile insurance market by requiring casualty companies to write such insurance who were not already in that market. "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations." *Ibid.* (upholding ordinance prohibiting vendors selling foodstuffs from pushcarts in the French Quarter, but exempting those vendors who have been selling in the French Quarter for eight years or more). *See also Ferguson v. Skrupa, supra*, 372 *U.S.* 726, 10 *L.Ed.* 2d 93 (upholding statute prohibiting anyone other than lawyers from engaging in the business of debt adjusting).

D.

We also reject the various arguments advanced by *amicus* that Section 72 violates the commerce clause. By enactment of the McCarran-Ferguson Act, 15 *U.S.C.S.* § 1011 *et seq.*,

Congress has expressly left to the states the regulation of the insurance business. Its purpose is to "give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 *U.S.* 408, 429, 90 *L.Ed.* 1342, 1360 (1946).

II.

In their final arguments, appellants challenge the action of the Commissioner on the grounds that he acted beyond the authority of Section 72, acted arbitrarily, capriciously, and unreasonably, and improperly acted through an adjudicatory process instead of through the adoption and application of regulations.

A.

The major complaint is that the Commissioner acted with an unreasonably heavy hand, and beyond his statutory authority, by compelling Twin City to continue to write private passenger automobile insurance for what may be more than five more years and also requiring appellants to give up writing other lines of insurance as the price for letting Twin City withdraw from the private passenger automobile insurance market.

In our prior discussion we sustained Section 72, including the authority it expressly and impliedly gives the Commissioner, as a reasonable implementation of a proper governmental purpose. For the same reasons we conclude that the Commissioner's actions were reasonable and therefore beyond our authority to overrule or modify. *N.J. Guild of Hearing Aid Dispensers v. Long*, 75 *N.J.* 544, 562-563 (1978).

B.

The State concedes that in one respect the Commissioner overstepped the bounds of Section 72. That section limits the Commissioner's discretion to order surrender of certificates of

authority to write other lines of insurance to those "certificates of authority issued pursuant to chapter 17 or 32 of Title 17." The Commissioner's order for orderly withdrawal requires surrender of certificates of authority not only by ITT Hartford Group's "property and casualty" affiliates but also by its "life and health affiliates." The Commissioner exceeded his statutory authority because ITT Hartford Group's foreign life and health insurer affiliates are not licensed under Title 17 but under Title 17B, specifically *N.J.S.A.* 17B:23-1. Accordingly, the Commissioner has agreed to modify his order to eliminate from its coverage Hartford Life Insurance Company and Hartford Life and Accident Insurance Company.

C.

Whatever concerns we may have had as to whether the Commissioner should have proceeded under duly adopted regulations rather than through an individual adjudicatory process have been rendered moot by the Commissioner's adoption of comprehensive regulations on April 23, 1991, *N.J.A.C.* 11:2-29. We do not pass on the substance of the regulations, but we remand to give Twin City an opportunity to have its withdrawal application reconsidered by the Commissioner in light of the provisions of these new regulations. *See Home News Publishing Co. v. State*, 224 *N.J. Super.* 7, 13 (App. Div. 1988); *Department of Corrections v. McNeil*, 209 *N.J. Super.* 120, 125 (App. Div. 1986), *certif. denied* 104 *N.J.* 422 (1986); *K.P. v. Albanese*, 204 *N.J. Super.* 166, 180 (App. Div. 1985), *certif. denied* 102 *N.J.* 355 (1985). *Accord 613 Corp. v. State of N.J., Div. of State Lottery*, 210 *N.J. Super.* 485 (App. Div. 1986).

D.

We are satisfied from a careful review of this record that the other issues raised are clearly without merit and require no further discussion. *R.* 2:11-3(e)(1)(E).

Section 72 of the Fair Automobile Insurance Reform Act of 1990, *L.* 1990, *c.* 8, *N.J.S.A.* 17:33B-30, is sustained as con-

stitutional. The matter is remanded to permit the Commissioner to reconsider Twin City's application for withdrawal in light of the provisions of *N.J.A.C.* 11:2-29.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ [Illegible]
Clerk

NEW JERSEY STATUTES ANNOTATED
TITLE 17. CORPORATIONS AND INSTITUTIONS FOR FINANCE AND INSURANCE
SUBTITLE 3. INSURANCE
PART 1B. AUTOMOBILE INSURANCE REFORM
CHAPTER 33B. FAIR AUTOMOBILE INSURANCE REFORM ACT OF 1990
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17:33B-30. Foreign companies; surrender of certificate; plan for withdrawal

An insurance company of another state or foreign country authorized under chapter 32 of Title 17 of the Revised Statutes to transact insurance business in this State may surrender to the commissioner its certificate of authority and thereafter cease to transact insurance in this State, or discontinue the writing or renewal of one or more kinds of insurance specified in the certificate of authority, only after the submission of a plan which provides for an orderly withdrawal from the market and a minimization of the impact of the surrender or discontinuance on the public generally and on the company's policyholders in this State. The plan shall be approved by the commissioner before the withdrawal or discontinuance takes effect. In reviewing a plan for withdrawal under this section, the commissioner shall consider, and may require as a condition of approval, whether some or all other certificates of authority issued pursuant to chapter 17 or 32 of Title 17 of the Revised Statutes held by the company or by other companies in the same holding company as the company submitting the plan should be surrendered. The certificate of authority of the company shall be deemed to continue in effect until the provisions of the approved plan have been carried out. The provisions of this section shall apply to any request for withdrawal, surrender or discontinuance filed on or after January 25, 1990.

Plan for Orderly Withdrawal
Submitted April 30, 1990

Plan for Orderly Withdrawal of Twin City Fire Insurance Company as Personal Automobile Insurer in New Jersey

INTRODUCTION

Twin City Fire Insurance Company ("Twin City") hereby submits its Plan for Orderly Withdrawal as a Personal Automobile Insurer in New Jersey ("Plan").

This Plan is limited to Twin City's New Jersey book of personal automobile insurance. The Plan is so limited because Twin City desires to minimize the effects of its license surrender on its New Jersey policyholders. This limitation, however, does not constitute a waiver by Twin City of any rights relating to the March 7 surrender of its entire Certificate of Authority, subject, of course, to a final determination in the action entitled *Jasper J. Jackson v. Twin City Fire Insurance Company*.

Twin City and its affiliates hereby request that the New Jersey Commissioner of Insurance (the "Commissioner") refrain from requiring (1) that Twin City surrender its Certificate of Authority in New Jersey to write lines of property and casualty insurance other than automobile insurance and (2) that any of Twin City's affiliates surrender their Certificates of Authority to write any lines of property and casualty insurance in New Jersey. With respect to Twin City, the basis for this request is that:

a.) Twin City's withdrawal as an automobile insurer will not cause a market availability problem or an undue disruption in the marketplace;

b.) Twin City's withdrawal will not adversely affect competition; and

c.) The public interest is best served by granting such a request because of the additional competition the company could provide in the homeowners and commercial insurance marketplace in New Jersey.

With respect to the affiliates of Twin City, this request is based upon the fact that Twin City has transferred all of its New Jersey business, other than its New Jersey personal auto insurance business, to various affiliated companies by a number of assumption/reinsurance agreements, effective January 1, 1990. (Copies of these assumption/reinsurance agreements are enclosed for the Commissioner's information. Exhibits A through D inclusive.) To date, these assumption/reinsurance agreements have *not* been put into effect, because of the temporary restraining order and preliminary injunction entered against Twin City by the New Jersey Superior Court. However, Twin City and its affiliates are prepared to implement these assumptions/reinsurance agreements with the consent of the New Jersey Department of Insurance and/or the New Jersey Superior Court. Accordingly, Twin City and its affiliates assert that Twin City's withdrawal as a personal auto insurer in New Jersey would have no negative impact on the residual markets for other lines of insurance, would cause no market availability problem or undue disruption in the marketplace, would not adversely affect competition with respect to other lines of insurance and, further, that the public intrest is best served by the granting of Twin City's request.

Twin City also requests that the Commissioner refrain from requiring any special deposits or performance bonds as security for performing its obligations and potential obligations in New Jersey. Twin City is a member insurance company of the group of insurance companies known as The Hartford Insurance Group. A number of Twin City's affiliates have been licensed in New Jersey for many years and, under this Plan, would continue to be licensed in New Jersey. Each of these affiliates is financially sound according to any applicable test. Based upon these circumstances, and based upon the further circumstances of Twin City's withdrawal, including but not limited to its relatively small share of New Jersey's personal

auto insurance market and the fact that its writing's in other lines of insurance in New Jersey will be continued in various affiliated companies, Twin City and its affiliates hereby request that the Commissioner refrain from requiring any such special deposit or performance bonds. If the Commissioner believes he needs any further assurance concerning the financial responsibility of Twin City or its affiliates, Twin City proposes that the Commissioner accept a resolution from the Board of Directors of Hartford Fire Insurance Company, Twin City's parent insurance company, affirming Hartford Fire Insurance Company's willingness to be financially responsible for Twin City during the period of Twin City's withdrawal and thereafter.

The information and data comprising Twin City's Plan is set forth below.

PLAN

A. 1. Twin City wishes to surrender its Certificate of Authority to write automobile insurance in New Jersey for the reasons set forth in its March 7, 1990 letter to the Honorable Jasper Jackson, Acting Commissioner of Insurance, a copy of which is attached hereto as Exhibit E and incorporated herein by reference.

The Statutory Financial Statement of Twin City for calendar years 1987, 1988 and 1989, documenting the company's financial condition for those three years, are enclosed as Exhibits F, G and H, respectively. Twin City is a participant in the Reinsurance Pooling Agreement ("Pooling Agreement") (Exhibit I) with other member companies of the Hartford Insurance Group. During the last three years (1987-1989), Twin City's surplus has increased from $60.3 million and, as of December 31, 1989, is $64.3 million. Twin City has had no unusual values for the NAIC IRIS tests during the last three years and has received a "Superior" rating from A. M. Best Company, one of the premier statutory rating organizations.

Also enclosed as Exhibits J, K and L, respectively, are the Certifications of Stephen L. Perreault and Michael H. Hughes and the Supplemental Certification of Stephen L. Perreault, all of which materials were additionally relied upon by Twin City in deciding to seek withdrawal.

2. The effective date of Twin City's withdrawal is May 1, 1990.

3. Twin City has held and continues to hold multiple line property casualty certificates of authority in all jurisdictions of the United States, including the District of Columbia. In each case, these certificates have been in effect for more than twenty (20) years.

Twin City has not withdrawn or sought to withdraw its certificate of authority in any jurisdiction other than New Jersey. It has not surrendered its certificate in any other jurisdiction, and no such certificate has been suspended or revoked. Further, Twin City currently has no plans to surrender its certificate of authority to do business in any jurisdiction other than New Jersey.

4. Schedule Y of Twin City's 1989 Statutory Financial Statement (Exhibit H) is an organizational chart showing the relationships among Twin City and its affiliates. This chart shows that Twin City is a wholly-owned subsidiary of Hartford Fire Insurance Company and that its affiliates writing property casualty insurance in New Jersey are also wholly-owned subsidiaries of Hartford Fire Insurance Company. Further information regarding Twin City and its property-casualty affiliates is as follows:

a. The lines of insurance which Twin City and each property casualty affiliate is licensed to write in New Jersey as follows:

Company	Lines of Insurance Licensed
Twin City Fire Insurance Company	Multiple Lines
Hartford Fire Insurance Company	Multiple Lines
Hartford Accident & Indemnity Company	Multiple Lines
Hartford Casualty Insurance Company	Multiple Lines
Hartford Underwriters Insurance Company	Multiple Lines
Hartford Insurance Company of the Midwest	Multiple Lines
Hartford Insurance Company of Connecticut	Multiple Lines
New England Insurance Company	Multiple Lines

b. Twin City and its affiliates operate under common management. The management is that of the parent insurance company, Hartford Fire Insurance Company.

c. The financial relationships among Twin City and its affiliates are as follows: Twin City participates in the Pooling Agreement with 15 other member companies of the Hartford Insurance Group.

d. The Marketing relationships among Twin City and its affiliates are as follows: Twin City and its Hartford, Connecticut headquartered affiliates market their insurance products and services collectively under the trade names "The Hartford," "The Hartford Insurance Group" and "ITT Hartford Insurance Group."

e. The agency relationships among Twin City and its affiliates are as follows: Twin City and its Hartford, Connecticut headquartered affiliates market their insurance products and services collectively through independent insurance agents who are generally appointed to represent all member insurance companies of The Hartford.

f. The claims handling among Twin City and its affiliates is handled as follows: Claims submitted to Twin City and its affiliates under policies issued by them are commonly handled by employees of Hartford Fire Insurance Company operating under management agreements

between Hartford Fire Insurance Company and its subsidiaries, including Twin City Fire Insurance Company.

5. During 1987, 1988 and 1989, Twin City wrote multiple lines of property casualty insurance in New Jersey. The details concerning these writings are shown in Exhibits M, N and O, respectively.

   Pursuant to Twin City's plan to surrender its New Jersey auto license only, neither Twin City nor any of its affiliates plans at this time to terminate any of their employees in New Jersey.

6. The address of each of Twin City's offices in New Jersey supporting its property casualty insurance operations is as follows:

   a.) Garden State Regional Office
   333 Mount Hope Avenue
   Rockaway, New Jersey 07866

   b.) Involuntary Market Operations Center
   333 Mount Hope Avenue
   Rockaway, New Jersey 07866

   c.) Morris County Full Service Claim Office
   333 Mount Hope Avenue
   Rockaway, New Jersey 07866

   d.) Red Bank Full Service Claim Office
   230 Half Mile Road
   Red Bank, New Jersey 077011

7. The form of non-renewal notice Twin City intends to sent to its policyholder is enclosed as Exhibit P. Each New Jersey personal auto policyholder will receive such a non-renewal notice. Pursuant to paragraph 8.1 below, Twin City proposes that, as each personal auto policy is renewed after the expiration of the six month period referred to therein, it will simultaneously issue its first notice of non-renewal. The second non-renewal notice will be sent at least sixty but not more than ninety days prior to the final policy expiration date.

Enclosed as Exhibit Q is a copy of the producer termination notice which Twin City intends to send to its producers.

8. The name and address of each open producer appointed by Twin City in New Jersey is shown in the enclosed Exhibit R(1). Exhibit R(2) shows the number of policies sold and the premium volume produced, by line of insurance, for the twelve month period ending December 31, 1989. The information in the latter exhibit is for open producers and closed producers electing renewal extension of servicing broker status.

9. Enclosed as Exhibits S and T, are specimen copies of Twin City's current standard Agency Agreement and Agency Agreement Declarations. Also enclosed as Exhibit U is a copy of Twin City's standard Servicing Broker Agreement.

10. Enclosed as Exhibit V is a copy of Dale R. Comey's March 8, 1990 letter on behalf of Twin City to Hartford Agents in New Jersey. The March 8 letter was rescinded by Mr. Comey on March 21, 1990 pursuant to the Order of the New Jersey Superior Court. Twin City intends to send a similar letter to its New Jersey agents as soon as the New Jersey Insurance Department has approved its Plan and/or as soon as it has the permission of the Superior Court. This correspondence will be in addition to any other correspondence to Twin City's producers and policyholders referred to elsewhere in this Plan.

11 Enclosed as Exhibits W to EE, inclusive, are copies of correspondence which Twin City intends to send to the following entities, to clarify its financial obligations with respect to such entities:

a.) Exhibit W is the letter Twin City intends to send to the Unsatisfied Claim Judgment Fund;

b.) Exhibit X is the letter Twin City intends to send to the New Jersey Property/Liability Guarantee Association;

c.) Exhibit Y is the letter Twin City intends to send to the New Jersey Automobile Insurance Risk Exchange Board;

d.) The Mutual Workers' Compensation Security Fund is not applicable to Twin City's withdrawal since Twin City is a stock company. Therefore, there is no letter enclosed for the Mutual Workers' Compensation Security Fund;

e.) Exhibit Z is the letter Twin City intends to send to the Stock Workers' Compensation Security Fund;

f.) Exhibit AA is the letter Twin City intends to send to the New Jersey Insurance Division of Fraud Prevention;

g.) Exhibit BB is the letter Twin City intends to send to the Commercial Automobile Insurance Plan;

h.) Exhibit CC is the letter Twin City intends to send to the New Jersey State Division of Taxation concerning its premium tax obligations;

i.) Since Twin City has been an admitted insurer in New Jersey, it need not send any correspondence to the Surplus Lines Guarantee Association. Therefore, no such letter is enclosed;

j.) The Medical Malpractice Reinsurance Association is in an inactive status; therefore, there is no letter to such association enclosed;

k.) Exhibit DD is the letter Twin City intends to send to The New Jersey Automobile Full Insurance Underwriting Association ("NJFIUA") concerning its examination assessments;

l.) Exhibit DD is also the letter Twin City intends to send to the NJFIUA concerning its residual market equalization charge and policy constant obligations to the state of New Jersey; and

m.) Exhibit EE is the letter Twin City intends to send to the Commissioner of Insurance concerning its obligations regarding financial examinations and other statutory fees.

12. Enclosed as Exhibit FF is a statement by Twin City, by line of insurance written, of all of its current incurred liabilities and reserves, including those incurred but not reported, in the State of New Jersey. This statement was developed and is certified by Albert J. Quirin, who is a duly authorized officer of Twin City and a Fellow of the Casualty Actuarial Society. The statement concerns itself with property casualty lines of insurance; since Twin City has not written life and health lines of insurance in New Jersey, no comparable statement for life and health lines is submitted herewith. Twin City's statement is as of March 31, 1990, which is a date not earlier than thirty days prior to the submission of this Plan.

13. Twin City intends to handle claims arising from its policies held by New Jersey residents, which policies remain in force after this Plan has been approved, in a manner fully consistent with its claim - handling activities prior to its withdrawal. It intends to meet its contractual obligations with respect to such claims and to follow its customary practices and applicable New Jersey statutes and regulations.

All such claims are reported to one of the two property and casualty field claim offices indicated in paragraph 6 above. Claims are handled, supervised and managed in such offices by a total staff of approximately ninety-six persons with limited support from outside adjusting facilities. Administrative management of these two field claim offices is provided by the claims headquarters office, located in the Garden State Regional Office. The staff in the Garden State Regional Office claim headquarters numbers approximately eighteen. The procedures for consumer contact will be those in place for Twin City prior to the commencement of its withdrawal.

14. There are no deposits of Twin City currently held by the Treasurer of the State of New Jersey.

15. Twin City has not assumed reinsurance.

16. Enclosed as Exhibit GG is a description of the national accounts of Twin City pursuant to which insurance has been provided for risks located in New Jersey. Since these accounts are all commercial insurance accounts, the withdrawal of Twin City from the personal auto insurance market in New Jersey will have little impact on the coverage provided to New Jersey risks covered under such national accounts. Coverage for such risks, including commercial auto coverage, will continue to be provided either directly or from other affiliates of Twin City pursuant to one or more of the assumption/reinsurance agreements referred to above.

17. With respect to Twin City's establishment of special deposits, or equivalent performance bonds, please refer to the opening paragraphs of this Plan, wherein Twin City requests that the Commissioner refrain from requiring such deposits or bonds.

18. Enclosed as Exhibit HH is a written certification from Anton A. Lubimir (the "Lubimir Certification"), a duly authorized officer of Twin City, signed under the pains and penalties of perjury, certifying that the information submitted in this Plan is accurate and complete to the best of his belief and is otherwise in compliance with applicable statutes and regulations.

19. Twin City proposes the following methods by which the Commissioner can verify Twin City's compliance with its obligations under this Plan:

    a.) Since Twin City's affiliates will retain their property casualty licenses in New Jersey, the Commissioner has authority pursuant to New Jersey law to examine the books and records of such companies at any reasonable time. Twin City and its affiliates will provide the Commissioner with prompt and reasonable access

to the records of Twin City and its affiliates relating to Twin City's withdrawal from New Jersey;

b.) Twin City will deem itself fully licensed in New Jersey during the period of its withdrawal and thereafter, for the purpose of allowing the Commissioner of Insurance reasonable and prompt access to its records for examination;

c.) Finally, Twin City and its affiliates will provide the Commissioner of Insurance with quarterly reports concerning the progress it is making under its Plan and its compliance therewith. Further, they will promptly and in good faith respond to individual inquiries from the Commissioner of Insurance and from policyholders and claimants and the legal representatives of both.

B.1. There is no express statutory authority requiring a minimum run-off period of one year or otherwise. Nevertheless, Twin City recognizes the advisability of a one year run-off period for renewal business. Twin City's proposed one year run-off period for renewal business is described below.

Twin City will seek to place its personal auto business with a replacement carrier in the voluntary market for a period of six months from the Commissioners' approval of its Plan or until all such personal auto insurance is replaced, whichever is sooner. Since Twin City issues only six-month policies in New Jersey, its proposal would provide for coverage for each policyholder for one additional policy period.

As each personal auto policy is renewed after the expiration of the six month period, Twin City will simultaneously issue its first notice of non-renewal to each of its then remaining policyholders. This notice will advise each recipient that coverage from Twin City will cease at the expiration of the then-renewing six-month policy. The second notice will be sent to each remaining policyholder

not less than 60, nor more than 90, days prior to the expiration of the six month period of coverage. Both non-renewal notices will comply in all relevant respects with the provisions of *N.J.A.C.* 11:3-8.2. In addition, in order to maximize the flexibility of its producers to procure replacement coverage, Twin City will process all mid-term cancellations on a pro-rata basis during the entire run-off period proposed.

2. Twin City hereby requests that the Commissioner exercise his discretion to permit Twin City to non-renew two (2) percent of its voluntary market policies in force in each territory at the end of a calendar year pursuant to *N.J.S.A.* 17:29C-7.1. Such non-renewals will be in addition to the non-renewals permitted by *N.J.A.C.* 11:3-8.3.

3. In making the request outlined in paragraph 2 above, Twin City acknowledges that the Commissioner has proposed that withdrawing companies not non-renew one policy for every two newly insured automobiles voluntarily written pursuant to *N.J.S.A.* 17:29C-7.1 on the basis that, once they implement a plan of orderly withdrawal, they are not issuing any new business in a fashion which is truly voluntary.

4. In view of paragraph 3 above, and consistent with the provisions of paragraph 3.e. of the Lubimir Certification, Twin City hereby specifically requests the Commissioner to waive the requirements of *N.J.S.A.* 17:30E-14 that it accept certain quotas of new business. Twin City requests such a waiver pursuant to *N.J.S.A.* 17:30E-14 (g) and for good cause shown. Twin City submits that good cause is shown for such request because it is inconsistent to require Twin City to "run off" its existing New Jersey personal auto business for a period of one year or more while, at the same time, requiring Twin City to accept, voluntarily or otherwise, new business applications for personal automobile insurance. On the same basis, Twin City also hereby requests the Commissioner to waive any other and further requirements existing at law or other-

wise that Twin City write new personal automobile insurance business in New Jersey during the period of its withdrawal.

5. Twin City does not now serve, nor has it ever served, as a servicing carrier in the New Jersey Automobile Full Insurance Underwriting Association.

STATE OF NEW JERSEY
DEPARTMENT OF INSURANCE

ORDER NO.: A90-151

IN THE MATTER OF THE "PLAN FOR ORDERLY WITHDRAWAL FROM NEW JERSEY" OF TWIN CITY FIRE INSURANCE COMPANY

ADMINISTRATIVE DECISION AND ORDER

This matter comes before the Commissioner of Insurance ("Commissioner") upon the filing by Twin City Fire Insurance Company ("Twin City") of a Plan for Orderly Withdrawal from the New Jersey Insurance Market, pursuant to the requirements of Section 7 of the Fair Automobile Insurance Reform Act of 1990, *L.* 1990, *c.* 8 Section 72 ("The FAIR Act"). For the reasons set forth in this Administrative Decision, Twin City's Plan for Orderly Withdrawal from New Jersey is approved, subject to certain substantial conditions.

I.

Introduction

Twin City is a property-casualty insurer admitted to transact business in this State pursuant to *N.J.S.A.* 17:32-1 *et seq.* (Twin City Certificate of Authority, copy attached). It is part of an insurance company holding system known as ITT Hartford Group, Inc. (Twin City Withdrawal Plan, page 2). Several other

companies in ITT Hartford Group, Inc. are licensed to write property/casualty insurance in New Jersey, including Hartford Fire Insurance Company, Hartford Accident and Indemnity Company, Hartford Casualty Insurance, Hartford Underwriters Insurance Company, Hartford Insurance Company of the Midwest, Hartford Insurance Company of Connecticut and New England Insurance Company. Two other subsidiaries, Hartford Life and Accident Insurance Company and Hartford Life Insurance Company write Life and Health Insurance in New Jersey (Twin City Withdrawal Plan, page 4). Hereinafter, these companies shall be referred to as the "affiliates". Management services for Twin City and its Affiliates are performed by the Hartford Fire Insurance Company. ITT Hartford Group, Inc. is the ultimate parent company of Twin City (Twin City Withdrawal Plan, Exhibit H, page 70).

Twin City primarily writes private passenger and commercial automobile insurance in New Jersey (Twin City Withdrawal Plan, Exhibit H, page 14). For private passenger automobile insurance its 1989 premium volume was $16.7 million covering 16,456 policyholders (Twin City Withdrawal Plan, Exhibit O), representing a 1.032% share of the private passenger automobile insurance market in this State (Twin City Withdrawal Plan, Exhibit O). For commercial automobile insurance, its 1989 premium volume was $49.6 million dollars, representing a 13% share of the commercial automobile insurance market (Twin City Withdrawal Plan, Exhibit O). In 1989 Twin City also wrote a small amount of homeowners insurance (Twin City Withdrawal Plan, Exhibit O). Through Twin City's affiliates, however, ITT Hartford Group, Inc. conducts substantial business in other lines of property/casualty insurance in this State (Affiliate 1989 Annual Statements, page 14, copies attached).

Twin City initially attempted to surrender its Certificate of Authority to the Department of Insurance ("the Department") without filing a Plan for Orderly Withdrawal as required by Section 72 of the FAIR Act. By letter dated March 7, 1990, Twin City forwarded its Certificate of Authority to the Department and simultaneously notified the Department of its intent to withdraw from the New Jerseys insurance market (Twin City Withdrawal Plan, Exhibit E). Acting Commissioner

Jasper Jackson returned Twin City's Certificate of Authority by letters dated March 8, 1990 (copy attached). In his letter, Acting Commissioner Jackson informed Twin City that its authority to write insurance in New Jersey would not be terminated until (a) Twin City filed a Plan for Orderly Withdrawal with the Department; (b) the Commissioner approved the Plan and (c) the Plan was fully implemented by Twin City (Jackson Letter dated March 8, 1990, copy attached). Acting Commissioner Jackson also forwarded to Twin City a copy of the Department's requirements and procedures for development of a Plan of Withdrawal.

By letter of counsel dated March 14, 1990, Twin City reiterated the position that its Certificate of Authority was effectively surrendered on March 7, 1990 and declined to submit a Plan of Orderly Withdrawal. Instead, counsel enclosed a copy of the Twin City's "Internal Program for Orderly Withdrawal." (Caldwell Letter dated March 14, 1990, copy attached). The Department responded by letter dated April 16, 1990, advising Twin City that its submission did not comply with the Department's Withdrawal procedures and requirements, and specifically listing its deficiencies (copy attached).

While these events were transpiring, Twin City notified 150 New Jersey producers of its intent to withdraw from the New Jersey market by letter dated March 8, 1990 (Twin City Withdrawal Plan, Exhibit V). Twin City also took action to nonrenew 3,000 of its automobile policies. The Department subsequently initiated an action in the Superior Court, Chancery Division, Mercer County entitled *Fortunato v. Twin City Fire Insurance Company, et al.*, (Docket No. 090-0037) alleging that Twin City's action violated Section 72 of the FAIR Act by failing to submit a Withdrawal Plan.

On March 15, 1990, the Honorable Samuel B. Lenox, A.J.S.C., issued a temporary restraining order which prevented Twin City from (a) surrendering its certificate of authority to write private passenger automobile insurance and other lines of insurance in New Jersey; (b) discontinuing the writing and renewal of private passenger automobile insurance and other lines of insurance in New Jersey, and (c) attempting, in any

manner or form, to effectuate a withdrawal form the private passenger automobile insurance and property/casualty markets in New Jersey, until such time as Twin City filed with and received approval for, from the Insurance Commissioner, a Plan for Orderly Withdrawal from the New Jersey market, and until such time as Twin City implemented the Plan of Withdrawal. (Order of Judge Lenox dated March 15, 1990, copy attached). On April 17, 1990, these temporary restraints were continued in the form of a preliminary injunction issued by the Honorable Paul G. Levy, J.S.C. (Order of Judge Levy dated April 17, 1990, copy attached). In addition, Twin City was ordered to immediately rescind its March 8, 1990 letter notifying its 150 New Jersey insurance producers of its intent to withdraw from the New Jersey market (Order of Judge Lenox). As a result of the court's decision, Twin City also ceased its efforts to nonrenew its automobile insurance policies, and further nullified its prior notice of nonrenewal on the 3,000 automobile insurance policies that had already been issued. (Letter of Dale Comey dated March 21, 1990, copy attached).

In the wake of the Court's decision, Twin City submitted a Plan for Orderly Withdrawal from New Jersey ("Plan") on April 30, 1990 (Letter of Dale Comey dated April 30, 1990, copy attached). The Plan contained a proposed effective date of May 1, 1990 (Letter of Dale Comey). Simultaneously with the submission of this Plan, Twin City again attempted to surrender its Certificate of Authority to the Department (Letter of Dale Comey).

By letter dated May 15, 1990, the Commissioner once more returned the Certificate of Authority to Twin City and informed Twin City that by law, such a surrender could only be effective upon approval and implementation of the Withdrawal Plan:

> Despite the fact that Twin City has filed a Plan of Withdrawal, I want to reiterate the Department's position that it cannot accept Twin City's submission of its Certificate of Authority to the Department. This fact was conveyed to you by Deputy Commissioner Jackson on March 8, 1990. Furthermore, under Section 72 of the

> FAIR Insurance Reform Act of 1990, which was enacted on March 12, 1990, I am expressly precluded from accepting any company's Certificate of Authority either for amendment or, in the alternative, surrender until I have approved an Orderly Plan of Withdrawal and the company has complied with that approved Plan. Therefore, I am returning herewith that Certificate to you. {(Letter of Commissioner Fortunato at page 2 (May 15, 1990)}.

The Commissioner further advised Twin City that inasmuch as its Plan was only submitted on April 30, 1990, it would not be possible to approve the Plan within 24 hours, for an effective date of May 1, 1990:

> Because Twin City's Plan was submitted on April 30, 1990, it was impossible for the Department to review and approve it by May 1, 1990, as you requested. As you no doubt appreciate, a withdrawal review requires the input of the various Divisions of the Department. Such a review is difficult to accomplish in a week, let alone 24 hours.
>
> However, I want to assure you that the Department staff will process the Plan as expeditiously as possible. That is, after my staff has reviewed the Plan for completeness, you will be advised if there are any deficiencies in the submission which must be cured. Once the Plan is determined to be complete (that is, all deficiencies, if any, have been satisfied), it will be reviewed by the appropriate Department staff and then presented to me along with recommendations for my consideration. {Letter of Commissioner Fortunato at page 1 (May 15, 1990)}.

Finally, the Commissioner indicated to Twin City that Section 72 of the FAIR Act required him to consider whether some or all of the Certificates of Authority of Twin City's Affiliate insurers within the ITT Hartford holding company system should also be surrendered as part of Twin City's withdrawal. He therefore directed Twin City to submit to the Department a certified statement listing "all of the Certificates of Authority held by all of the companies in New Jersey within

the Hartford Group holding company system, specifying the lines of business as well as the volume of premium written in each line." (Letter of Commissioner Fortunato dated May 15, 1990, at page 2).

On June 7, 1990, Assistant Insurance Commissioner John Conover wrote to Twin City to advise that the Department had completed its initial review of its Withdrawal Plan (Conover letter dated June 7, 1990, copy attached). Assistant Commissioner Conover informed Twin City that this initial review had revealed a number of areas of material concern where additional information would be of assistance to the Department in expediting its review of the Twin City Plan (Conover letter). Accordingly, the Assistant Commissioner requested that Twin City submit the following information:

(1) An Amendment to the Plan to include commercial automobile and homeowners lines of insurance scheduled to be transferred to Twin City affiliates.

(2) Information pertaining to Twin City's life/health affiliates, in addition to the information already received pertaining to its property/casualty affiliates.

(3) Additional information pertaining to the number of private passenger automobiles insured in New Jersey during 1987, 1988 and 1989 to correspond to the number of Twin City policies in force during those years.

(4) Additional information necessary to enable the Department to verify the accuracy of Twin City's stated incurred liabilities and reserves.

(5) Additional information regarding Twin City's plans for its commercial areas of automobile insurance. (Conover Letter).

The supplemental information requested by the Department was submitted by Twin City on June 14 and 19, 1990 (Murray and Lubimir Letters, copies attached).

II.

Twin City's Withdrawal Plan

Twin City's Plan proposes to withdraw only its private passenger automobile insurance in New Jersey by nonrenewing the policies and withdrawing its rating system (Twin City Withdrawal Plan, pages 1 and 9). To enable it to continue writing its other lines in New Jersey, Twin City has requested that the Commissioner ". . . refrain from requiring (1) that Twin City surrender its Certificate of Authority . . . and (2) that any of Twin City's affiliates surrender their Certificates of Authority to write lines of property and casualty insurance in New Jersey." (Twin City Withdrawal Plan, page 1). In the event the Commissioner requires Twin City to surrender its Certificate of Authority it offers to transfer (through assumption of reinsurance agreements) all of its other in-force business to its affiliates (Letter of Wesley Caldwell dated June 14, 1990, copy attached).

In correspondence with the Department, Twin City's affiliates have also proposed to eliminate their rating systems for private passenger automobile insurance in New Jersey (Letter of William Murray dated May 4, 1990, copy attached.)[1] It is clear from this correspondence that ITT Hartford Group, Inc. as a whole wishes to exit the private passenger automobile insurance market in New Jersey. The only exception to this proposed general withdrawal is an automobile and homeowners insurance program operated by Hartford Underwriters Insurance Company limited to members of the American Association of Retired Persons (AARP) (Letter of Kevin Kupec dated June 19, 1990, copy attached).

Twin City offers several reasons for its withdrawal in Exhibit E of the Plan, all of which relate to the FAIR Act's projected impact on operations (Twin City Plan, Exhibit E). Specifically,

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1 The Twin City affiliates affected by the proposed suspension of automobile insurance rating systems include Hartford Fire Insurance Company, Hartford Accident and Indemnity Company, Hartford Casualty Insurance Company, Hartford Insurance Company of Connecticut and Hartford Insurance Company of the Midwest (Murray Letter).

it mentions the Act's elimination of certain rating factors, and its surtaxes and assessments to fund the residual market deficit under the FAIR Act (Twin City Withdrawal Plan, Exhibit E). In addition, Twin City includes a forecast of underwriting losses due to allegedly inadequate rates (Twin City Withdrawal Plan, Exhibit E). Twin City received a rate increase of 14.4% effective August 1, 1988 but has not requested or received a rate increase since that date (Memorandum of Richard Boer dated June 6, 1990, copy attached).

Twin City proposed in its Plan to seek a replacement carrier for its personal automobile insurance business for a period of six months after the date of Plan approval or until all of the policies are replaced, whichever is sooner (Twin City Withdrawal Plan, page 9). After the expiration of the six months the policyholder will receive a non-renewal notice that coverage will cease at the expiration of the then-renewed six-month term (Twin City Withdrawal Plan, page 9). A second notice of non-renewal would be mailed to each remaining policyholder not less than 60 nor more than 90 days prior to the termination of the six month period of coverage in compliance with *N.J.A.C.* 11:3-8.2 (Twin City Withdrawal Plan, page 9).

III.

The Impact of Twin City's Withdrawal Upon the New Jersey Insurance Market

The New Jersey private passenger automobile insurance market presently is undergoing a period of transition and adjustment in the wake of the enactment of the FAIR Act on March 12, 1990. That Act implements certain reforms in New Jersey's automobile insurance law, the impact of which cannot fully be assessed until several years have elapsed. For example, Section 20 of the FAIR Act contemplates an initial shifting of 60% of insureds currently in the residual market from that market to the voluntary market as part of the depopulation of the New Jersey Automobile Full Insurance Underwriting Association ("JUA"). Ultimately, all but a very small percentage of the

insureds currently assigned to the JUA must be absorbed by the voluntary market. Simultaneously, Section 25 of the FAIR Act creates a new definition of "eligible persons" for whom insurers in the voluntary market are obligated to provide coverage. In addition, Section 56 of the FAIR Act imposes certain cost saving measures by requiring insurers to implement procedures for the control of fraudulent practices within the industry. Finally, Section 69 of the Act implements changes in the ratemaking process by prohibiting insurers from using the services of rating organizations for ratemaking purposes. In sum, the FAIR Act has created a climate of change within the private passenger automobile insurance market in New Jersey. It will be a number of years before the full impact of these and many other FAIR Act reforms can be fully assessed.

Given this climate of change, a precipitous withdrawal by Twin City from the New Jersey marketplace will create a disruption in market stability. If Twin City leaves the New Jersey marketplace suddenly, the burden of insuring its current book of 16,456 policyholders will fall immediately upon the remaining automobile insurers in New Jersey. In order to lessen this burden upon those insurers and in order to abate the sudden shock to the market resulting from an abrupt withdrawal by Twin City, I find that it is necessary to implement Twin City's withdrawal gradually as replacement carriers are found, to provide the voluntary market with sufficient opportunity to absorb Twin City's book of business while simultaneously adjusting to the reforms imposed by the FAIR Act.

IV.

The Department's Determination

For the reasons set forth below, I find that Twin City's withdrawal from the private passenger automobile insurance market in New Jersey should be approved. However, I find that the Plan of Withdrawal submitted by Twin City requires certain substantial modifications necessary to protect the interests of the insured public and to maintain the stability of the New

Jersey insurance market. I therefore approve the Plan, subject to the following substantial conditions:

1. *First Condition*: Twin City's Certificate of Authority shall be amended immediately upon approval of the Plan to limit and restrict its use to the lines of insurance currently underwritten. The Certificate shall be surrendered and Twin City's authority to write business in this State shall be terminated only when Twin City's New Jersey liabilities and potential liabilities have been fully satisfied and no longer exist.

Discussion: Continuation of the Certificate of Authority is necessary during the implementation of the Plan because Twin City must perform various underwriting, claims and administrative activities which constitute transacting the business of insurance within this State pursuant to *N.J.S.A.* 17:32-19. In addition, Section 72 of the FAIR Act requires that "The Certificate of Authority of the company shall be deemed to continue in effect until the provisions of the plan have been carried out."

2. *Second Condition*: Within 30 days after its receipt of this Decision and Order, Twin City shall apply to the Governing Committee of the Commercial Automobile Insurance Plan ("CAIP") to initiate an expeditious and orderly termination as a CAIP servicing carrier.[2]

3. *Third Condition*: Twin City shall be required to seek for a period of no more than five years after the date of this Decision and Order, a replacement carrier or carriers acceptable to the Commissioner for its New Jersey private passenger automobile insurance business. If Twin City is successful in

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2 CAIP is a program established by the Commissioner pursuant to *N.J.S.A.* 17:29D-1 to assist New Jersey insureds in obtaining commercial automobile insurance. The statute, in its form prior to amendment by the FAIR Act, authorized the Commissioner to "adopt, issue and promulgate rules and regulations establishing a plan for the providing and apportionment of insurance coverage for applicants therefore who are in good faith entitled to, but are unable to procure the same through ordinary method." *N.J.S.A.* 17:29D-1. The statue required all insurers transacting business in New Jersey to participate in the Plan. Twin City is a servicing carrier in CAIP.

placing all of its insureds with such other carriers prior to the expiration of this five-year period, and if Twin City's New Jersey liabilities and potential liabilities[3] have been fully satisfied prior to expiration of this five-year period, then Twin City's Certificate of Authority shall be surrendered and its authority to write business in New Jersey shall be terminated as of the date that these requirements have been fulfilled. If at the end of the five-year period, Twin City has not succeeded finding replacement coverage for all of its insureds, Twin City may nonrenew its remaining policies in-force as the policies expire.

4. *Fourth Condition*: With respect to all of its other lines of business, Twin City shall be required to seek, for a period of no more than five years after the date of this Decision and Order, a replacement carrier or carriers acceptable to the Commissioner. Upon either placing all of its other business with an acceptable replacement carrier or the expiration of five years, whichever is sooner, Twin City shall nonrenew its remaining other insurance business in-force as the policies expire.

Discussion: I find that a five-year period for the procurement of replacement coverage on Twin City's private passenger automobile book of business is a reasonably sufficient period of time to accomplish the goal, discussed in section III of this Decision and Order, of providing the voluntary market with sufficient opportunity to absorb Twin City's book of business while simultaneously adjusting to the reforms imposed by the FAIR Act. I further find that a five-year period for the procurement of replacement coverage on Twin City's other lines

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3 "Liabilities" are defined as the total losses and loss adjustment expenses arising from Twin City's current book of business as actually reflected by its financial records. The term "loss" is defined as "the basis for a claim for indemnity or damages under the terms of an insurance policy." The term "loss adjustment expense" is defined as expense "involved in the adjusting of losses—Adjuster's fees—Court costs—lawyer's fees, etc." Davids, Lewis E., *Dictionary of Insurance* (Littlefield, Adams & Co. 1970). Potential liabilities are those liabilities which have not yet been incurred but which may reasonably be foreseen to develop from Twin City's current book of business.

of business (*e.g.*, commercial automobile and homeowners coverage) is appropriate because, as reflected in Twin City's Annual Statements for the years 1987, 1988 and 1989, those other lines of coverage have historically been very profitable for Twin City and can certainly be placed with other carriers by the end of the five-year period, if not sooner. If developments in subsequent years indicate that the market can absorb Twin City's books of business, and adjust to the FAIR Act reforms more rapidly than the respective five year time frames contemplated by this Decision and Order, Twin City may apply to the Department for reconsideration of these time frames.

It should also be noted that there are 32 other pending requests for withdrawal that have been submitted to the Department since the FAIR Act was adopted. It is therefore essential for the future viability of the New Jersey private passenger automobile insurance marketplace that financially sound insurers like Twin City, which have historically profited from New Jersey business, be prevented from leaving the New Jersey market in a hasty or disorderly manner. Until the Department has an opportunity to assess the impact of all withdrawal applications upon the New Jersey market, protection of the public interest requires that companies not be permitted to accomplish quick withdrawals. While a withdrawal by any one company may have a limited impact, withdrawal by other companies may well have a large impact upon the market. Given these circumstances, I find that the most prudent course of conduct, at this time, is to require that the process of withdrawal be implemented gradually. Twin City's withdrawal cannot be considered in a vacuum, but must be viewed in terms of the impact that multiple withdrawals will have upon the New Jersey market.

5. *Fifth Condition*: All of Twin City's property and casualty and life and health affiliates within ITT Hartford Group, Inc. shall surrender their respective Certificates of Authority for amendment immediately upon approval of Twin City's plan, so the Department can limit and restrict the use of each affiliates's certificate to the property and casualty and life and health lines of insurance it currently writes in New Jersey. Twin City's

property and casualty and life and health affiliates shall submit to the Commissioner for approval their respective Plans of Orderly Withdrawal within 60 days after receipt of this Decision and Order. In particular, the Plan of Withdrawal for Hartford Underwriters Insurance Company shall include its homeowners and automobile insurance program for members of the American Association of Retired Persons (AARP). Those Plans of Withdrawal shall provide for the termination of the transaction of insurance business in New Jersey no later than five years from the date of approval of the plans of withdrawal by the Commissioner, as the affiliates' policies expire, after which time the Certificates of Twin City's affiliate companies will be indefinitely suspended. With regard to the life and health lines of insurance written by the affiliates, the terms of the Withdrawal Plan shall not encompass those life/health policies which are noncancellable by operation of law. The affiliates shall retain limited authority to continue the servicing and renewal of such policies.

Discussion: Section 72 of the FAIR Act requires a foreign insurer admitted in this State to submit for approval its Plan of Orderly Withdrawal. The statute further provides that: "In reviewing a plan for withdrawal under this section, the commissioner shall consider, and may require as a condition of approval, whether some or all other Certificates of Authority issued pursuant to Chapter 17 or 32 of Title 17 of the Revised Statutes held by the company or by other companies in the same holding company as the company submitting the plan should be surrendered." This statute requires the Commissioner to consider whether requiring affiliates to surrender their Certificates of Authority is appropriate under the circumstances. Twin City seeks a waiver of this provision, and requests that the Certificates of its affiliates not be affected. I choose not to grant the waiver, but to require that Twin City's affiliates likewise withdraw from doing business in New Jersey. I do so for several compelling reasons.

The business of insurance in New Jersey is a highly regulated business. In particular, automobile insurers must accept regulation as the necessary price for the guaranteed stable mar-

ket which results from this State's mandatory automobile insurance laws. Controls over market entry and exit are essential parts of the regulatory scheme provided by statute. Just as the regulatory scheme restricts nonrenewal of individual insurance policies by specifying allowable limited reasons for nonrenewal, it also empowers the Commissioner to exercise control over nonrenewal of large blocks of business. These controls include the Commissioner's authority to provide disincentives to large block nonrenewals by requiring the insurer seeking to nonrenew such business to cease writing other lines of business that may at a particular time be perceived as more profitable. Furthermore, since an insurer may, for its own purpose, choose to operate through a holding company system of affiliated companies, effective regulation of an Insurer necessarily includes the power to control the activities of affiliates. The instant case presents an appropriate context for the exercise of both of these powers.

In denying the requested waiver it should be noted that circumstances which would mitigate in favor of a waiver do not exist.

First, the withdrawal of Twin City from the private passenger automobile insurance business may be expected to have a negative impact on the residual market and exacerbate market availability problems in the future. All insurers transacting private passenger automobile business in New Jersey are required to absorb business from the residual market resulting from the depopulation and elimination of the JUA. This requirement is part of an overall plan of reform implemented by the FAIR Act in which various groups in society, including but not limited to automobile owners, insurers, attorneys, doctors and the State government, must work together to resolve what unquestionably has become a severe crisis in automobile insurance in this State. By applying for Twin City's withdrawal from New Jersey, Twin City and its parent ITT Hartford Group seek to avoid their share of this obligation, thereby increasing the obligation of their fellow insurers in the New Jersey market. At the same time however, Twin City and ITT Hartford Group seek to enjoy the benefits derived from transaction of business in New

Jersey on other highly profitable lines of insurance (*e.g.*, commercial automobile insurance homeowners insurance, life insurance and accident and health insurance). This result is inequitable. If Twin City and its parent desire to continue to enjoy the benefits of their more profitable operations in this State, they must be prepared to meet the statutory obligations which accompany that privilege. If Twin City and its parent do not wish to bear those statutory obligations they cannot reasonably expect to continue to exercise their statutorily conferred privilege to do business in this State by dumping what they perceive to be allegedly unprofitable business on the market while simultaneously maintaining profitable lines of business either at Twin City or any other affiliated insurer of ITT Hartford Group.

In reaching this conclusion, I emphasize that I make no finding here that Twin City's private passenger automobile book of business is unprofitable. Indeed, a review of Twin City's Annual Statements for the years 1988 and 1989 indicates that on a national basis, its private passenger automobile lines have historically been profitable (Annual Statements for 1988 and 1989, Insurance Expense Exhibit).

Moreover, given Twin City's historic record of profitability in this area it is likely that it would continue in the future to realize a profit on its automobile book of business, even when the reforms imposed by the FAIR Act are taken into consideration. I find only that Twin City's Withdrawal from the New Jersey market is motivated by its perception that its automobile book of business will become unprofitable by virtue of the enactment of the FAIR Act (Plan at Exhibit E), which perception I further find to be wholly unfounded.

Second, the reasons advanced by Twin City for its actions to withdraw are based upon the duties and obligations to be undertaken by all New Jersey private passenger automobile insurers arising from the FAIR Act. Twin City has indicated that a prime motivation for its withdrawal is its perception that the FAIR Act will adversely impact upon its profitability in the future (Twin City Withdrawal Plan, Exhibit E). In adopting this position, Twin City ignores the fact that it remains at all times

free to apply to the Commissioner for an increase in its rates pursuant to *N.J.S.A.* 17:29A-14 and to avail itself of an annual flex rate increase pursuant to *N.J.S.A.* 17:29A-44. I note in passing that Twin City has not applied for a prior approval rate increase since 1988, nor has it availed itself of a flex rate increase for the years 1989 and 1990 (Boer letter of June 6, 1990). Instead, Twin City and ITT Hartford Group have chosen to ignore the avenues for rate relief available to them in favor of the more drastic alternative of withdrawal. Having failed to address the question of Twin City's profitability through well established ratemaking procedures in this State, ITT Hartford Group should not be permitted to achieve profitability for its subsidiaries by shifting Twin City's profitable lines to those subsidiaries and by dumping Twin City's automobile book of business on the New Jersey market.

Third, it should be noted that the withdrawal is not due to the hazardous financial conditions of Twin City or other specific problems affecting its solvency (Twin City Withdrawal Plan, Exhibits F, G and H).

Fourth, unlike the withdrawal of John Hancock Insurance Company from the New Jersey market, which was approved by the Department as part of a national plan to cease writing property-casualty insurance, Twin City's withdrawal from private passenger automobile insurance is limited to New Jersey. It is not part of an overall plan of withdrawal in other jurisdictions as part of a corporate restructuring (Twin City Withdrawal Plan, page 1).

Finally, there appears to be no compelling public interest that would be served by granting the waiver and permitting the affiliates to continue to transact other lines of business in New Jersey. The lines of business offered by the affiliates are not unique to those affiliates but can be provided by other insurers in the market. The New Jersey public will therefore not be deprived of any opportunity to obtain any unique or unusual type of coverage if the affiliates no longer do business in New Jersey.

Twin City's Plan contains a proposal to transfer its more profitable lines to its Hartford Group affiliates, while nonre-

newing only its allegedly unprofitable private passenger automobile insurance business. This proposal is contrary to the interest of the New Jersey insurance-buying public. Furthermore, any attempt by Twin City or ITT Hartford Group to establish a new corporation for purposes of absorbing what Twin City believes to be its profitable lines of business would also be unacceptable.

The continuation of the business of writing of writing private passenger automobile insurance in New Jersey at this particular time is especially and uniquely in the public interest. Requiring Twin City's affiliates to withdraw from other lines leaves those lines of business for other insurers and is likely to encourage the remaining insurers to continue writing private passenger automobile business in New Jersey. Other insurers committed to remaining in New Jersey will be able to boost their own profitability by absorbing the profitable nonautomobile lines of business which Twin City's affiliates will leave behind. Generally, these other lines of business, such as homeowners insurance, commercial automobile insurance, commercial property liability insurance, life insurance, accident and health insurance, inland marine insurance, fire insurance, allied lines and farmowners insurance, are very profitable, as reflected by the overall operating ratios in these areas. *Best's Aggregates and Averages, Property-Casualty* (1989 edition) at pages 189, 192, 194, 199 and 204. Accordingly, these lines of insurance are highly attractive to insurers. Furthermore, the approach which I adopt here provides an incentive for new insurers willing to write all lines to enter the New Jersey marketplace. It is appropriate, however, to permit Twin City's affiliates to continue to write these other lines for a limited period of five years, so as to provide an opportunity to prepare for the total cessation of business.

In reaching the determination to require surrender of the Certificates of Authority of Twin City's affiliates, I have been guided by my concern that the shifting of more profitable lines of business to Twin City's affiliates and the simultaneous dumping of its automobile business would create a serious disruption in the private passenger automobile insurance market

in New Jersey. I note that the New Jersey Supreme Court has expressed precisely this same concern in *Sheeran v. Nationwide Mutual Insurance Company, Inc.* 80 *N.J.* 548 (1979). *Sheeran* involved an attempt by an insurer to withdraw from its fire and casualty insurance lines of business in New Jersey. The insurer challenged certain Insurance Department regulations, promulgated pursuant to the New Jersey Automobile Reparation Reform Act (No-Fault Act), *N.J.S.A.* 39:6A-1, *et seq.*, requiring a mandatory period of policy renewals as part of the withdrawal process, *Id.* at 552. The Court found a clear legislative intent to minimize the impact of wholesale policy nonrenewals on the market:

> Testimony given during the public hearings which proceeded the passage of the Act dealt on several occasions with questions concerning mass nonrenewals. In particular, several witnesses highlighted *the problems which might ensue should insurance companies withdraw or threaten to withdraw from the State because of alleged inadequacy of rates.* The Legislature must therefore be deemed to have been aware of these problems and to have acted in order to prevent their occurrence. Consequently, there is no warrant to rewrite the clear wording of the Act so as to exempt this particular defendant from its proscription.
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> Moreover, when read as a whole, *the (No-Fault) Act evinces a clear legislative intent that companies which choose to write automobile policies in this State maintain their fair share of coverage.* In the words of Judge Greenberg at the trial level, insureds are to be accorded 'the advantage of guaranteed renewals of indefinite duration with a particular company.' *This intent would by and large be frustrated if we were to rule that carriers can refuse to renew all of their existing policies and yet retain the ability to insure in the future those customers whom they consider desirable. Such an end run around the statutory scheme can not be countenanced. {Sheeran v.*

Nationwide Mutual Insurance Company, Inc. 80 *N.J.* 548, 556-557 (1979) (Emphasis added; citations omitted)}.

As with the prior No-fault Act, I find that Section 72 of the FAIR Act also evinces on its face a clear legislative intent to avoid the disruption posed by wholesale policy nonrenewals through implementation of a mechanism for orderly withdrawal from the marketplace. I also find a clear legislative intent in Section 72 to avoid a situation where a withdrawing insurer can pick and choose its business by dumping what it perceives to be unprofitable business on the market and by retaining, or shifting to affiliates, what it perceives to be profitable business. The provisions of the FAIR Act which require the Commissioner to determine whether a company and its affiliates may continue to write other lines of insurance in New Jersey must be considered in this context. My decision to require Twin City and its affiliates to cease writing all other lines of business thus is particularly appropriate, not only for the many reasons noted above, but because it is consistent with the approach of the Supreme Court in *Sheeran*.

6. *Sixth Condition*: At the expiration of each of the respective five year periods during which it must seek replacement coverage for its entire book of business, Twin City shall mail nonrenewal notices to policyholders in the following manner:

a. With regard to automobiles insurance policies, the first notice shall be provided to each policyholder six months prior to the next policy expiration date. The second notice shall be provided in compliance with the requirements of *N.J.A.C.* 11:3-8.2 with regard to time and contents of the notice.

b. With regard to all other insurance policies, notice shall be provided to each policyholder at least 90 days prior to next policy expiration date.

c. To the extent it has not already done so, Twin City shall submit all proposed forms of notices to be sent to policyholders and agents to the Department for review and approval prior to mailing.

Discussion: The first private passenger automobile insurance nonrenewal notice to be sent six months prior to the policyholder's next policy expiration date, is necessary to afford the policyholder adequate time to seek replacement insurance from another licensed insurer. The second automobile insurance nonrenewal notice, sent pursuant to *N.J.A.C.* 11:3-8.2, serves as a reminder of the approaching nonrenewal at the policy's expiration date and is in compliance with the pertinent law. The nonrenewal notice for all other policyholders is consistent with current statutes and administrative rules, providing a reasonable measure of consumer protection.

7. *Seventh Condition*: During the period of five years in which Twin City must either obtain replacement carriers or continue to write private passenger automobile insurance, Twin City shall be permitted to avail itself of the nonrenewal provisions contained in *N.J.A.C.* 11:3-8 and *N.J.S.A.* 17:29C-7.1. It may apply for appropriate rate changes, *N.J.S.A.* 17:29A-14. It shall comply with all other appropriate laws as amended by the FAIR Act which are not inconsistent with this Decision and Order, specifically including but not limited to the following:

a. *N.J.S.A.* 17:33B-15 regarding mandatary availability and issuance of automobile insurance coverage;

b. *N.J.S.A.* 17:33B-25 prohibiting an insurer from refusing to issue or renew automobile insurance;

c. *N.J.S.A.* 17:33B-9 regarding mandatory assignment of producers; and

d. *N.J.S.A.* 17:30E-14 and *N.J.S.A.* 17:33B-11 regarding residual market depopulation quotas and the sharing of profits and losses related to residual market business.

Discussion: This requirement is necessary in order to provide for an orderly private passenger automobile insurance market over the next several years, during which time the transition to the market structure contemplated in the FAIR Act will occur. Requiring Twin City to accept it duties and obligations as any other private passenger automobile insurer will facilitate that transition process. Any exemption for Twin City

from these obligations would simply transfer them to other insurers, increasing their burdens and making the period of transition even more difficult.

8. *Eighth Condition*: If a policyholder cancels a policy after receiving the first notice of nonrenewal, Twin City shall be required to refund any unearned premium related to such policy on a pro-rata basis.

Discussion: *N.J.S.A.*17:29C-4.1 provides that a policyholder is entitled to receive a "short rate" refund within 60 days after the policyholder initiates the policy cancellation. Since Twin City's Plan proposes to initiate the termination of all policies, all policyholders who cancel their policies should be entitled instead to the benefit of a pro-rata refund within 60 days pursuant to Twin City's rating system which has been filed and approved by the Department.

9. *Ninth Condition*: Within 30 days after this Decision and Order, Twin City shall make the following deposits, or provide equivalent surety bonds, until such time as its New Jersey liabilities and potential liabilities no longer exist:

a. $13.8 million dollars with, and in the name of, the Commissioner for the benefit of all Twin City's New Jersey policyholders, claimants and creditors;

b. $500,000 with, and in the name of, the Commissioner to insure Twin City's performance of the provisions of the Plan, a breach of which shall constitute an immediate forfeiture of the entire deposit; and

c. In lieu of the paragraph 9(a) deposit or surety bond, Twin City may substitute a certified resolution of the Board of Directors of either Twin City's immediate parent, Hartford Fire Insurance Company, or its ultimate parent ITT Hartford Group, Inc., guarantying Twin City's liabilities and potential liabilities.

Discussion: To guard against the possibility that Twin City may not have adequate funds on hand to justify its obligations, a deposit or bond to protect Twin City's New Jersey policyholders, claimants and creditors is necessary in the amount of 125% of the estimated reserves for New Jersey losses and loss

adjustment expenses. The $13.8 million deposit represents 125% of Twin City's New Jersey reserve figure, $11 million (Twin City 1989 annual Statement). The $13.8 million deposit represents a conservative approach which I believe is essential and appropriate to safeguard the public interest. Therefore, absent a guaranty from its corporate parent, an amount greater than 100% of reserves is essential to ensure that money will be available to satisfy all of Twin City's obligations, and to avoid a breakdown in coverage for the insured public. To provide a reasonable alternative to Twin City, an appropriate resolution of the Board of Directors guarantying the paragraph 9 (a) liabilities will suffice as a substitute for the deposit or bond and provide the necessary protection for the public in New Jersey.

A $500,000 performance deposit should be sufficient to provide for any penalties which may result from a breach of the provisions of the Plan.

10. *Tenth Condition*: Twin City shall continue to be responsible for discharging its financial obligations to New Jersey funds, associations, boards and agencies without exception, as required by law.

Discussion: Twin City will continue doing business in New Jersey during the period of time that the Plan is being implemented. Therefore, it must remain obligated to the State of New Jersey as a condition of doing business similar to all other insurers.

11. *Eleventh Condition*: Twin City shall submit to the Department, upon request, quarterly financial and informational reports of nonrenewal activity, in a form to be specified by the Department, within 45 days after the preceding calendar quarter until the nonrenewal activity is complete.

Discussion: This requirement is a necessary condition to provide the Department with a procedure for monitoring Twin City's compliance with the Plan and this Decision and Order.

12. *Twelfth Condition*: Twin City shall submit the following documents to the Department until such time as its New Jersey liabilities and potential liabilities no longer exist:

a. Annual statements on NAIC blanks as prescribed by *N.J.S.A.* 17:23-1. Twin City shall remain subject to examination by the Department as deemed necessary by the Commissioner;

b. Upon the Commissioner's request, NAIC quarterly financial statements and supporting documentation within 45 days after each calendar quarter; and

c. Annual statements of opinion by a qualified actuary relating to loss and loss adjustment expense reserves pursuant to *N.J.A.C.* 11:1-21.

Discussion: These conditions are required as the Department must continue its regulatory oversight for as long as necessary to protect the interest of the New Jersey public and to ensure an orderly withdrawal.

NOW THEREFORE, pursuant to the authority granted by *N.J.S.A.* 17:1-8.1, 17:1C-6(e) and 17:33B-30 and all powers expressed or implied therein;

IT IS on this 14th day of August, 1990,

ORDERED that the Plan is hereby approved subject to the following substantial conditions:

1. Twin City's Certificate of Authority shall be amended immediately upon approval of the Plan to limit and restrict its use to the lines of insurance currently underwritten. The Certificate shall be surrendered and Twin City's authority to write insurance in this State shall be terminated when Twin City's New Jersey liabilities and potential liabilities no longer exist.

2. Twin City shall seek, for a period of no more than five years after the date the Plan is approved (the "Commencement Date"), replacement carriers acceptable to the Commissioner for its private passenger automobile insurance business in New Jersey.

3. Upon either placing all of its private passenger automobile insurance business with an acceptable voluntary market replacement carrier or the expiration of five years, whichever is sooner, Twin City may nonrenew its remaining private pas-

senger automobile insurance business in-force as the policies expire.

4. With respect to all of its other business, Twin City shall seek, for a period of no more than five years after the Commencement date, replacement carriers acceptable to the Commissioner. Upon either placing all of its other business with acceptable replacement carriers or the expiration of five years, whichever is sooner, Twin City shall nonrenew its remaining other insurance business in-force as the policies expire. Thereafter, Twin City shall retain only limited authority to continue the servicing and renewal of any life/health policies that are noncancellable by operation of law.

5. All of Twin City's property and casualty affiliates and life and health affiliates shall submit their respective Certificates of Authority for amendment immediately upon approval of Twin City's Plan, so that the Department can limit and restrict the use of each affiliate's Certificate of Authority to the property and casualty and life and health lines of insurance that the affiliate currently writes in New Jersey. Twin City's property and casualty affiliates shall, within 60 days of the Commencement Date, submit to the Commissioner for approval their respective Plans of Orderly Withdrawal, which shall provide that the affiliates shall nonrenew all business in all lines of insurance beginning no later than five years after the Commencement Date as the policies expire. In particular, the Plan of Withdrawal for Hartford Underwriters Insurance Company shall include its homeowners and automobile insurance program for members of the American Association of Retired Persons (AARP). Each affiliate's Plan of Orderly Withdrawal shall provide that its Certificate of Authority shall be indefinitely suspended when its New Jersey liabilities and potential liabilities no longer exist. The affiliates shall retain only limited authority to continue the servicing and renewal of life/health policies which are noncancellable by operation of law.

6. Upon expiration of the respective five year periods during which it must seek replacement coverage for its entire book

of business, Twin City shall mail nonrenewal notices to policyholders in the following timely manner:

a. With regard to private passenger automobile insurance policies, the first notice shall be provided to each policyholder six months prior to the next policy expiration date. The second notice shall be provided in compliance with the time and content requirements of *N.J.A.C.* 11:3-8.2.

b. With regard to all other insurance policies, notice shall be provided to each policyholder at least 90 days prior to the next policy expiration date.

c. Twin City shall submit all notices to be sent to policyholders and agents to the Department for review and approval prior to mailing.

7. During the period of five years after the Commencement Date, Twin City shall be permitted to avail itself of the nonrenewal provisions set forth in *N.J.A.C.* 11:3-8 and *N.J.S.A.* 17:29C-7 and shall be subject to and comply with all other laws which are not inconsistent with this Decision and Order specifically including but not limited to the following:

a. *N.J.S.A.* 17:33B-15 regarding mandatory availability and issuance of automobile insurance coverage;

b. *N.J.S.A.* 17:33B-25 prohibiting an insurer from refusing to issue or renew private passenger automobile insurance;

c. *N.J.S.A.* 17:33B-9 regarding mandatory assignment of producers; and

d. *N.J.S.A.* 17:30E-14 and *N.J.S.A.*17:33B-11 regarding residual market depopulation quotas and the sharing of profits and loses related to residual market business.

8. Twin City shall be required to refund premium on a pro-rata basis to policyholders who cancel their policies after receiving a nonrenewal notice pursuant to this Decision and Order.

9. Twin City shall be required to make the following deposits or provide equivalent surety bonds until such time as

its New Jersey liabilities and potential liabilities no longer exist:

a. $13,800,000 with, and in the name of, the Commissioner for the benefit of all Twin City's New Jersey policyholders, claimants and creditors;

b. $500,000 with, and in the name of, the Commissioner to insure Twin City's performance of the provisions of the Plan, a breach of which shall constitute an immediate forfeiture of the entire deposit; and

c. In lieu of the deposit or surety bond required in paragraph 9 (a) above, a certified resolution of the Board of Directors of either Twin City's immediate or ultimate parent, Hartford Fire Insurance Company or ITT Hartford Group, Inc, respectively, guarantying Twin City's liabilities and potential liabilities may be substituted.

10. Twin City shall continue to be responsible for discharging its financial obligations to New Jersey funds, associations, boards and agencies without exception, as required by law, including the timely payment of residual market equalization charges.

11. Twin City shall submit to the Department, upon request, quarterly financial and informational reports of nonrenewal activity, in a form to be specified by the Department, within 45 days after the preceding calendar quarter until the nonrenewal activity is completed.

12. Twin City shall submit to the Department until such time as its New Jersey liabilities and potential liabilities no longer exist:

a. Annual statements on NAIC blanks as prescribed by *N.J.S.A.*17:23-1. It shall remain subject to examination by the Department as deemed necessary by the Commissioner;

b. Upon the Commissioner's request, NAIC quarterly financial statements and supporting documentation within 45 days after each calendar quarter; and

c. Annual statements of opinion by a qualified actuary relating to loss and loss adjustment expense reserves pursuant to *N.J.A.C.*11:1-21.

13. The terms of this Administrative Decision and Order shall not apply to any life/health policies issued by Twin City and its affiliates, at the time when no further new business will be conducted, which are noncancellable by operation of law.

14. Within 30 days after its receipt of this Decision and Order, Twin City shall apply to the Governing Committee of the Commercial Automobile Insurance Plan ("CAIP") to initiate an expeditious and orderly termination as a CAIP servicing carrier.

To the extent that Twin City believes any of the issues raised by this Decision and Order require a hearing, Twin City may, within 7 days of the date of its receipt of this Decision and Order, submit to the Department a written statement of the reasons why it believes a hearing to be necessary. Thereafter, I will determine whether a hearing should be held on this matter. If no written statement is received from Twin City within the time specified, the terms of this Decision and Order shall automatically become final.

August 14, 1990
Date

/s/ SAMUEL F. FORTUNATO
Samuel F. Fortunato
Commissioner

THE NEW YORK TIMES METROPOLITAN

TUESDAY, AUGUST 21, 1990

Going Toe-to-Toe Over Car Insurance Bills in New Jersey

By WAYNE KING
Special to The New York Times

TRENTON, Aug. 20—Gov. Jim Florio won a test of wills with one of the nation's insurance giants last week, but the war over who will ultimately pay the bills for the state's $3 billion auto insurance fiasco is certain to be a long one

News Analysis

Governor Florio and his Insurance Commissioner, Samuel Fortunato, sent a message to the insurance industry that it cannot simply walk away from the mess it helped create by dumping millions of drivers into the Joint Underwriting Association, a state-financed insurance pool, while it insures only the best risks.

What the state did was tell ITT Hartford, one of the biggest insurers in the nation, that if it wanted to pull out of the auto insurance business in New Jersey, it would have to give up lucrative business in lines like health and homeowner's policies as well. "If they won't play by the rules," an angry Mr. Florio said, "we won't let them sell us anything."

The Hartford's president and chairman, Donald Frahm, then retreated from the company's announced intention to withdraw from the auto insurance market in the state

The reason was fairly clear: The company's private auto insurance business in the state amounts to $17 million a year, but its total business—including health, life, homeowner and other policies—comes to $308 million

So Mr. Frahm said, "if it is necessary to continue to write automobile insurance in New Jersey in order to keep the rest of its business, Hartford will do so."

But that is by no means the end of it, either for the Hartford or for 32 other auto insurers—including Allstate, which insures 450,000 drivers in the state—who have either petitioned the state to withdraw or otherwise let it be known that they don't want to write auto insurance in the state under its new rules.

ITT Hartford has already been to court to overturn the new rules, unsuccessfully so far, and says it may go back again to gain the right to bail out of the state's auto insurance market. Two other suits are challenging the new rules, one in state court and one in Federal court.

Those new rules, drawn by the Florio administration and passed by the legislature last February in reaction to the financial disaster created by the existing system, are not much different from those of most other states, with one major difference: they require the insurers to pay for at least $1.4 billion of the Joint Underwriting Association's $3 billion deficit under the old system.

Insuring Poor Risks

State officials acknowledge the old system was poorly designed. But they also say the insurance companies took advantage of it and now want to run away from the mess they were instrumental in creating.

The Joint Underwriting Association was begun in 1984 as a way to insure "poor-risk" drivers who could not get insurance on the commercial market. Instead of being insured by companies like Allstate or Hartford, these drivers were insured by the state. Their premiums went to the state and their claims were paid by the state.

But the insurance companies administered the system. They decided who was put into the state pool, and they settled the claims, deciding how much the state had to pay.

The insurance companies assigned not only the poor-risk drivers to the state pool, but also any driver who appeared to have any risk at all. Paid an 8 percent commission for the policies, the companies made more money, risk free, the more policies they wrote.

The result was that two years ago, 53 percent of the state's drivers were assigned to the high-risk pool.

Millions in Inflated Claims

The insurers also settled the claims brought under the state system, though the state paid the money. The companies received a second fee for settling a claim, and until two years ago, the fee was based on the size of the settlement.

State officials contend that inflated and in some cases fraudulent claims totaled more than $900 million.

The state system was also supposed to be self-sustaining. That is, the premiums paid by the drivers assigned to the system were supposed to be high enough to pay all the claims levied against it.

But because the claims were so high, the premiums rocketed, and, because of political pressures, the state was reluctant to keep increasing them. When the state finally did increase the premiums, the surcharge amounted to about $225, not just for drivers in the pool, but for every driver in the state.

The howls went up, and last February, Governor Florio made good on a campaign promise to scrap the underwriting system, which will begin phasing out in October.

But projections are that the system will end up with a debt of $3 billion, and the new insurance laws require that insurers doing business in the state, through assessments and other devices, will have to pay at least $1.4 billion of that. And the new law bars the companies from passing the costs on to policy holders in the form of higher premiums.

Peter van Aartrijk, a spokesman for the Insurance Information Institute in New York, a nonprofit information service sponsored by casualty insurers, said every state regulates insurers and issues certifications, or licenses, for the various forms of insurance.

All also have regulations regarding withdrawing from an insurance market and canceling or declining to renew existing policies. But, said Mr. van Aartrijk, this seldom becomes a problem except in instances where dramatic changes in the

insurance situation occur, such as in New Jersey, where the law was changed to eliminate the Joint Underwriting Association.

He said that New Jersey's strong stance in refusing to allow insurance companies to leave whenever they want is similar to that adopted by Massachusetts four years ago when its auto insurance industry became unprofitable for some companies and many wanted to withdraw.

Massachusetts also told companies that they must surrender all their insurance business if they insist on withdrawing under conditions that would create "disruption in the marketplace," which is taken to mean that drivers would be left without insurance or with claims that might not be paid.

Companies were allowed to quit doing business in the state, but had to pay assessments, in the millions of dollars, for the right to do so.

For the time being, ITT Hartford says it will stay, but it will not leave the new rules unchallenged.

Early skirmishes in the court have upheld the state's right to lay down the new rules, but the decisions are by no means final.

While the handling of the ITT Hartford challenge makes it clear that the state will not yield easily, Insurance Commissioner Fortunato said that each company will be dealt with individually.

A company that writes only auto insurance here, for example, could not be threatened with loss of its other business if it withdrew from auto insurance. But officials say the state law is strong enough that a company could be forced to continue to operate here unless it provided alternative insurance for its policy holders.

Also, officials here say that one reason it treated the Hartford so firmly was that the company had been peremptory and uncooperative in its attempt to withdraw from the auto market.

"Each future case will be decided on its own merits," Mr. Fortunato said. "But any prudent lawyer or company would review what has transpired up to this point."

THE NEW YORK TIMES METROPOLITAN

WEDNESDAY, AUGUST 15, 1990

New Jersey Warns of Ban on Insurer

Could Lose All Business If It Drops Auto Policies

By WAYNE KING
Special to The New York Times

TRENTON, Aug. 14—State officials told the ITT Hartford Insurance Group today that if one of its subsidiaries wants to cancel its automobile insurance policies in New Jersey, the giant insurer will be barred from doing any business in the state.

The action was the first taken against any of the 32 insurers that have applied to drop their automobile coverage in New Jersey because of laws enacted this year to hold down premiums and eliminate a $3 billion deficit in the Joint Underwriting Association, the State's insurance pool for high-risk driver

In an order delivered by facsimile at noon today, Gov. Jim Florio informed the subsidiary, the Twin City Fire & Casualty Company, that if it canceled its 23,000 auto policies in New Jersey, its parent, ITT Hartford, must also surrender licenses held by nine other subsidiaries to sell homeowner, health and life insurance.

'Can't Have It Both Ways'

"If they won't play by the rules, if they won't play fair with our drivers, then they can't have it both ways," Mr. Florio said today. "If they won't sell us car insurance, we won't let them sell us anything."

ITT Hartford collects about $17 million in premiums, about 1 percent of the total private passenger automobile insurance in the state, through the Twin City subsidiary. But it does far more business in other insurance lines like property and casualty and health and life.

Though state officials have no firm figure for the total volume of business all the Hartford subsidiaries do in New Jersey and have asked the company to provide specific dollar volumes, it is estimated that the amount runs "in the hundreds of millions."

The order for the Hartford to surrender all of its certificates of authority, or licenses, to sell any form of insurance was laid down in a lengthy statement by Samuel F. Fortunato, the Insurance Commissioner. It detailed what the company must do if it withdraws from New Jersey's auto insurance market.

Besides surrendering all its licenses, the company must remain in the market for five years, gradually phasing out its auto insurance customers and it must seek replacement coverage for those customers before refusing to renew any policy, the order said.

The commissioner's order also requires the company to post a $13.8 million bond to pay any future liabilities the company may have in the state.

No Specific Guidelines

Ken Ferraro, a company spokesman, said the Hartford had just received the order and "we're still discussing options."

It was not known what the Hartford would do next, but a New Jersey court has already said that the company must exhaust all administrative remedies before suing.

The strict guidelines for withdrawing from the turbulent New Jersey auto insurance market were issued under the authority of the Fair Auto Insurance Reform law passed in February and made retroactive to Jan. 1.

The law gives the insurance commissioner wide leeway in determining the circumstances under which an insurer can withdraw from New Jersey.

Since the passage of the law and the scrapping of the Joint Underwriting Association, 32 companies have petitioned to stop selling automobile insurance in New Jersey.

Although the state-operated association was intended to insure drivers unable to get insurance on the commercial market, it grew to include more than half the drivers in the state.

That occurred mainly because insurance companies wrote the policies for the program, decided which drivers would be in it and collected an 8 percent fee, state officials have said. The state was responsible for the system and claims against it.

When the system was scrapped this year, it was estimated to have a $3 billion debt, and the Governor's insurance reform law not only made insurance companies responsible for high-risk drivers, but also mandated that they pay a large portion of the debt.

Many said they would rather withdraw from the New Jersey market.

Mr. Fortunato's order today made clear that withdrawal will not be easy.

"Until the department has an opportunity to assess the impact of all withdrawal applications upon the New Jersey market, protection of the public interest requires that companies not be permitted to accomplish quick withdrawals," he said.

First Withdrawal Rejected

The Commissioner's decision, along with a two-paragraph cover letter, was sent today to Donald R. Frahm, the chairman of ITT Hartford, only hours after the Commissioner executed the order. It is the latest move in a battle that began on March 7 when Twin City returned its auto insurance certificate and notified the state it planned to withdraw from the market.

The state rejected that withdrawal, sent the certificate back and said the company could withdraw only after submitting a Plan of Orderly Withdrawal as required by the new law.

The company immediately began issuing nonrenewal notices on about 3,000 policies, and brought suit to overturn the law. But the courts in several orders stopped the company, saying it must submit a plan first. The courts also said that the company could not sue until it has exhausted its administrative remedies.

No. 92-728

Supreme Court, U.S.
FILED
DEC 28 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

TWIN CITY FIRE INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, HARTFORD ACCIDENT AND INDEMNITY COMPANY, HARTFORD CASUALTY INSURANCE COMPANY, HARTFORD UNDERWRITERS INSURANCE COMPANY, HARTFORD INSURANCE COMPANY OF THE MIDWEST, NEW ENGLAND INSURANCE COMPANY, AND HARTFORD INSURANCE COMPANY OF CONNECTICUT,

Petitioners,

v.

SAMUEL F. FORTUNATO, COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF INSURANCE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

RESPONDENT'S BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a State, in the exercise of its exclusive regulatory oversight of the business of insurance, violate substantive due process or takings principles by requiring an insurance holding company that chooses to withdraw an affiliate from the State's troubled automobile insurance market to (1) assure that the affiliate continues fulfilling, pending its departure, its general obligations as a licensed insurer to write and renew such policies, and (2) surrender the licenses of its affiliates to write more lucrative business in the State, where such measures rationally serve the public interest in protecting drivers that have become dependent upon such coverage and in stabilizing the disruptive market consequences of insurer withdrawals?

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The principal constitutional provisions and New Jersey statutes cited herein are, in pertinent part, as follows:

Fifth Amendment

> [N]or shall private property be taken for public use, without just compensation.

Fourteenth Amendment

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

N.J. Stat. Ann. § 17:32-2(d)

> No [foreign insurance] company shall be admitted until it:
>
> d. Obtains from the commissioner a certificate that it has complied with all the requirements of this subtitle applicable to it, and is authorized to transact business in this State. This certificate shall expire on May 1 of the following year, and shall be renewed each year before May 1; provided, that the commissioner may refuse to issue or renew any such certificate of authority if, in his judgment, such refusal will best protect the interests of the people of this State or if the company fails to comply substantially with any requirement or limitation of this subtitle applicable to it or any rule or regulation promulgated by the commissioner thereunder which in the judgment of the commissioner is reasonably necessary to protect the interests of the people of this State, but the commissioner may not refuse to renew any such certificate except after notice and hearing[.]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED – Continued

N.J. STAT. ANN. § 17:33B-2(g)

The Legislature finds and declares that:

(g) To provide a healthy and competitive automobile insurance system in this State, automobile insurers are entitled to earn an adequate rate of return through the ratemaking process.

N.J. STAT. ANN. § 17:33B-30

An insurance company of another state or foreign country authorized under chapter 32 of Title 17 of the Revised Statutes to transact insurance business in this State may surrender to the commissioner its certificate of authority and thereafter cease to transact insurance in this State, or discontinue the writing or renewal of one or more kinds of insurance specified in the certificate of authority, only after the submission of a plan which provides for an orderly withdrawal from the market and a minimization of the impact of the surrender or discontinuance takes effect. In reviewing a plan for withdrawal under this section, the commissioner shall consider, and may require as a condition of approval, whether some or all other certificates of authority issued pursuant to chapter 17 or 32 of Title 17 of the Revised Statutes held by the company or by other companies in the same holding company as the company submitting the plan should be surrendered. The certificate of authority of the company shall be deemed to continue in effect until the provisions of the approved plan have been carried out. The provisions of this section shall apply to any request for withdrawal, surrender or discontinuance filed on or after January 25, 1990.

STATEMENT OF THE CASE

This case primarily involves distinctive aspects of New Jersey law, arising from the state's history in implementing its public policy of mandatory automobile insurance and its various statutory measures aimed at solving chronic problems in the exclusively state-regulated insurance industry.

A. Introduction

In an effort to redress a long-standing statewide automobile insurance crisis, the New Jersey Legislature enacted in 1990 a wide-ranging statute designed to reform underwriting practices, restore market stability, and raise revenues to satisfy a $3.3 billion deficit amassed by the State's residual facility for insuring higher-risk drivers. That statute, known as the "FAIR Act"[1], includes key withdrawal provisions that require licensed insurers seeking to cease writing policies in the State to first obtain approval from the State Insurance Commissioner of a "plan which provides for an orderly withdrawal from the market and a minimization of the impact . . . on the public generally and on the company's policyholders in this State." N.J. STAT. ANN. § 17:33B-30 (West 1992). Among other things, the 1990 statute obligates the Commissioner to consider requiring, as a condition of withdrawal, the surrender of some or all of the New Jersey licenses held by the departing carrier or by affiliated insurers within the same holding company system. *Ibid.* The FAIR Act also includes a variety of comprehensive, and largely controversial, measures to reform the State's insurance system on a massive scale.

Just a few days before the FAIR Act was adopted, the ITT Corporation[2] abruptly attempted in March 1990 to pull one of its corporate affiliates out of the State private passenger insurance market, thereby leaving many of that affiliate's over 16,000 customers – who are legally obligated under State law to have liability

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[1] The full name of the statute is the "Fair Automobile Insurance Reform Act", L. 1990, c. 8, N.J. STAT. ANN. § 17:33B-1, *et seq.* (West 1992) (effective March 12, 1990).

[2] ITT Corporation is the ultimate corporate parent of the petitioners in this case. See Petitioners' Statement Pursuant to Rule 29.1, Petition for Certiorari ("Pet.") at ii.

insurance[3] – without a ready means to obtain replacement coverage. Exercising his powers to act in the public interest, the Insurance Commissioner obtained a court injunction arresting petitioners' hasty and selective withdrawal, and thereafter administratively imposed substantial conditions on that withdrawal consistent with the new statute. Petitioners unsuccessfully resisted those conditions on various grounds in the state appellate courts, and now seek this Court's review by reasserting two constitutional arguments under the Due Process and Takings Clauses that were rejected below.

As demonstrated herein and in the detailed unanimous opinions of the state appellate courts, petitioners' exaggerated constitutional arguments challenging New Jersey's regulatory scheme raise no substantial issues that warrant this Court's review. Nor are there any conflicts among the federal circuit courts or state appellate courts that need the Court's resolution in this case.

B. The 1990 Reform Statute and Twin City's Hasty and Selective Attempt to Abandon Its Over 16,000 New Jersey Automobile Policyholders on the Eve of Its Passage

On March 12, 1990, the FAIR Act was signed into law. The FAIR Act is designed to fundamentally alter and stabilize the conduct of the business of automobile insurance in New Jersey. A major goal of the FAIR Act is to eliminate the State's previous residual market mechanism for insuring non-commercial drivers, the Automobile Full Insurance Underwriting Association (the "JUA"), and to adopt, after a two-year transition period, a new system of assigning to insurers persons who are unable to obtain such coverage in the voluntary market. N.J. STAT. ANN. § 17:33B-2(h) (West 1992). The FAIR Act also accelerated the schedule for the downsizing, or "depopulation", of the JUA (which at its zenith covered over 50% of the New Jersey market) in preparation for a new assigned risk plan, which would provide coverage to only 10% of the market starting October 1, 1992. N.J. STAT. ANN. § 17:30E-14; § 17:33B-11 (West 1992). Moreover, the

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[3] Since 1973 New Jersey has required automobile owners in the State to purchase liability and other specified coverages. *See* N.J. STAT. ANN. § 39:6A-1, *et seq.*

FAIR Act provided a means to pay the debts and obligations of the JUA by imposing taxes and fees for several years on insurance companies, doctors, lawyers, bad drivers and others.[4]

Section 72 of the FAIR Act (N.J. STAT. ANN. § 17:33B-30) sets forth the conditions pursuant to which "foreign"[5] insurers (insurers incorporated in other states or foreign countries, but licensed to do business in New Jersey) may withdraw from the New Jersey insurance market. Under Section 72, no withdrawal from the New Jersey insurance market can take place until an insurer submits a plan of orderly withdrawal for the Commissioner's review; obtains the Commissioner's

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[4] *See, e.g.*, N.J. STAT. ANN. § 17:33B-49 (West 1992) (surtaxes on automobile insurance premiums in 1990, 1991 and 1992); N.J. STAT. ANN. § 17:30A-8 (West 1992) (assessments on property-casualty insurers from 1990 through 1997). The facial constitutionality of the surtaxes and assessments imposed upon insurers under the statute was sustained by the New Jersey Supreme Court in *State Farm v. State*, 590 A.2d 191 (N.J. 1991), in a landmark opinion which, as the Court thereafter observed in this case, comprehensively traces and explains the history of New Jersey's regulatory efforts to combat the "intractable problem of providing coverage for high-risk drivers." *State Farm v. State*, *supra*, 590 A.2d at 191, quoted in *In the Matter of the "Plan for Orderly Withdrawal From New Jersey" of Twin City Fire Insurance Company*, 609 A.2d 1248, 1254 (N.J. 1992), *aff'g* 591 A.2d 1005 (N.J. App. Div. 1991) (hereinafter "*Twin City*"). Likewise, the annual fees imposed on attorneys, physicians, and other professionals under the FAIR Act have withstood constitutional scrutiny by New Jersey's appellate courts. *See N.J. Bar Association v. Berman*, 611 A.2d 119 (N.J. App. Div. 1992) (attorney tax); *Medical Society v. Florio*, Docket No. A-3519-90T2 (N.J. App. Div. 1992) (unpublished) (annual fees on physicians and other licensees). Finally, it should be noted that this Court has already declined review earlier this year of the State's efforts under the FAIR Act to depopulate the residual market by assigning risks to licensed insurers. *In re Matter of Assignment of Exposures to Aetna Casualty & Surety Co., Allstate Insurance Co. and Colonial Penn Insurance Co.*, 591 A.2d 631 (N.J. App. Div. 1991), certif. den. 599 A.2d 162 (N.J. 1991), *cert. denied*, 503 U.S. ___, 112 S.Ct. 1244 (1992).

[5] The FAIR Act also contains parallel provisions governing the orderly withdrawal of domestic insurers chartered in New Jersey, including the same "affiliate-surrender" and "new business" features objected to by petitioners here. See N.J. STAT. ANN. § 17:17-10(b) (West 1992).

approval; and implements the plan.[6] As noted, the Commissioner may approve an insurer's plan of orderly withdrawal if it provides for (1) the applicant's orderly withdrawal from the market; (2) a minimization of the impact of the surrender or discontinuance on the public generally; and (3) a minimization of the impact of the surrender or discontinuance on the company's policyholders in this State. N.J. STAT. ANN. § 17:33B-30 (West 1992). The company's status as a licensed insurer remains in effect until its withdrawal is complete. *Id.* Further, the statute prescribes that the Commissioner "shall consider, and may require as a condition of approval, whether some or all other certificates of authority issued pursuant to Chapter 17 or 32 of Title 17 of the Revised Statutes held by the company or by other companies in the same holding company as the company submitting the plan should be surrendered." *Id.*[7]

These statutory measures are thus designed to assure that an insurer wishing to leave New Jersey does so in a regulated, orderly manner that does not leave its policyholders in the lurch or the insurance market in disarray. The State Legislature has determined that it is in the public interest to direct the Insurance Commissioner, as part of that regulatory oversight, to consider whether each affiliate within an insurance holding company should surrender its license when a related insurer chooses to withdraw from the New Jersey market. By such means, the Commissioner can prevent

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[6] The Legislature, no doubt fearing an exodus of insurers out of the State while the FAIR Act was being deliberated, made the withdrawal provisions of the Act retroactive to January 25, 1990, the date the bill had first been introduced. *Ibid.*

[7] After responding to substantial industry comments, the Commissioner adopted final regulations, effective May 20, 1991, to implement the withdrawal statute, which include, *inter alia*, factors relevant to his determination of whether to waive the condition that affiliates surrender their certificates of authority. *See* 23 N.J. Register 1673 (May 20, 1991). Those regulations are included in Respondent's Appendix ("Resp.A."). *See* N.J. Admin. Code 11:2-29.3(c) (Resp.A-19). These factors include, for example, consideration of such matters as whether the withdrawal is due to "specified problems affecting the solvency of the applicant." N.J. Admin. Code 11:2-29.3(c)(4) (Resp.A-20). The regulations codified informal Department of Insurance guidelines and policies that predated the FAIR Act and parallel considerations cited in the Commissioner's August 14, 1990 Decision and Order regarding petitioners.

a holding company from selectively "dumping" its less remunerative automobile insurance affiliate – thereby forcing a large group of policyholders *en masse* to seek coverage with another insurer – while other affiliates within that holding company continue to reap the benefits of more lucrative lines of insurance.[8] The Legislature has also determined that, pending their withdrawal, licensed insurers must continue to share the same obligations as all other licensed carriers in the State.

As the unrefuted record[9] below reflects, petitioner Twin City Fire Insurance Company ("Twin City") is a property-casualty insurer incorporated in Indiana, licensed to transact business in each of the fifty states and the District of Columbia. A member of the ITT Hartford Group holding company system, Twin City is a wholly-owned subsidiary of Hartford Fire Insurance Company ("Hartford Fire"), as are the other six affiliates covered by the Administrative Order.[10] The ITT Corporation is the parent company of Hartford Fire and, indirectly through Hartford Fire, owns and controls 100% of Twin City and the other six affiliates. Twin City primarily writes in New Jersey private passenger and commercial automobile insurance.[11] Its sister ITT affiliate, Hartford

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[8] This legislative approach takes into account a corporate structure, commonly and advantageously employed in the industry, where several affiliated insurance companies operate under one holding company umbrella. See N.J. Stat. Ann. § 17:27A-1, *et seq.* (West 1992) (regulating holding companies of New Jersey insurers). The affiliate-surrender provision also recognizes the obvious business opportunities for "cross-sales" of an insurer's other lines when its agents sell State-mandated automobile coverage to customers.

[9] Twin City failed to accept the Commissioner's specific invitation to request an evidentiary hearing on any fact issues raised by the Commissioner's August 1990 administrative decision on its withdrawal. (Pet.A-97).

[10] The six affiliates include Hartford Accidental Indemnity Company, Hartford Casualty Insurance Company, Hartford Underwriters Insurance Company, Hartford Insurance Company of the Midwest, New England Insurance Company and Hartford Insurance Company of Connecticut. For sake of convenience, respondent shall at times collectively refer to the petitioners' holding company enterprise as "ITT Hartford," as did the State Supreme Court. 609 A.2d at 1252.

[11] As reflected in the Commissioner's 1990 administrative order, in 1989 Twin City insured 16,456 New Jersey private passenger automobile policyholders,

Underwriters Insurance Company ("Hartford Underwriters"), also writes personal automobile insurance in New Jersey, including policies generated through its valued nationwide endorsement from the American Association of Retired Persons ("AARP").

As the State Supreme Court observed, the record reveals many inter-relationships and synergies between Twin City and its affiliates that justify considering them a common enterprise for regulatory purposes. Specifically, Twin City and its affiliates market their products collectively under common trade names through common agents with general authority to bind member companies of ITT Hartford, process claims collectively through personnel of Hartford Fire, and participate with each other in reinsurance-pooling agreements. 609 A.2d at 1252. Indeed, as petitioners' counsel conceded before the State Supreme Court, the decision to withdraw Twin City's private automobile insurance lines from New Jersey would be dictated by ITT Hartford management. 609 A.2d at 1259.

Despite the loss projections presented by petitioners to this Court, the record in the State proceedings indicates that Twin City and its affiliates have enjoyed – and are assured under New Jersey law – the opportunity to earn a fair rate of return on their New Jersey automobile insurance business. Through at least 1989 Twin City reported healthy profits on its private passenger auto business, and since that time Twin City has availed itself annually of New Jersey's automatic

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business which earned it $16.7 million that year in annual premium revenues. (Pet.A-72). Twin City also wrote a sizable 13% of New Jersey's commercial automobile business in 1989, earning $49.6 million in premiums from those 10,975 commercial policies, which included a number of major national accounts of "Fortune 500" corporations. It is true that Twin City, standing alone, insured slightly more than 1% of New Jersey's private passenger voluntary auto insurance market in 1989. However, if one combines Twin City's personal automobile business with the private passenger "books" of Hartford Underwriters and Twin City's other affiliates, the ITT Hartford insurers collectively ranked in the top 20 largest of the more than 100 insurance companies writing private passenger auto business in the State.

"flex rate" increases tied to consumer price indices.[12] Most significantly, Twin City *refrained* from seeking from the State any "prior approval" rate increases for its personal automobile lines from *August 1988* through the date of the State Supreme Court's decision,[13] despite the fact that state law specifically guarantees automobile insurers the right "to earn an adequate rate of return through the ratemaking process." N.J. STAT. ANN. § 17:33B-2(g) (West 1992). *See also State Farm v. State*, *supra* n.4, 590 A.2d at 206-207 (sustaining FAIR Act's facial validity under Takings and Due Process Clauses, given the Act's express recognition of insurers' rights to earn fair returns). In addition, the administrative decision below noted that Twin City's other lines of insurance "have historically been very profitable." (Pet.A-82, A-85).

As the Legislature anticipated, the passage of the FAIR Act prompted a veritable stampede[14] of insurers seeking to withdraw from automobile insurance lines in New Jersey. On March 7, 1990, in expectation of the Governor's imminent signing of the FAIR Act into law, Twin City hurriedly attempted to surrender its certificate of authority to the Department of Insurance without filing a withdrawal plan. Despite the Department's refusal to accept the certificate as

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[12] The record leading up to the Commissioner's August 1990 withdrawal decision shows Twin City's private passenger auto business in New Jersey earned, by its *own* economic analyses and assumptions, profits of at least 4.6% in 1987, 4.8% in 1988, and 5.4% in 1989. Further, Twin City took advantage of State-sanctioned flex rate increases of 5.7% in 1990, 6.3% in 1991 and 2.9% in 1992. Moreover, the State contests the business losses alleged by petitioners, and presented affidavits in the State court proceedings questioning petitioners' then-current calculations. Those affidavits, which are part of the record below, will be furnished to the Court in a supplemental appendix in the event the petition is granted.

[13] Twin City was granted by the Insurance Department a "prior approval" rate increase of 14.4% for its private passenger automobile lines effective August 1, 1988. (Pet.A-78).

[14] The record below indicates that some 32 automobile insurers sought at that time to withdraw from New Jersey. 609 A.2d at 1257. (Pet.A-82). Only a few of those companies ultimately pursued plans of withdrawal with the Department of Insurance, which is no doubt attributable in part to the salutary deterrent effects of the *Twin City* decision. 609 A.2d at 1259-60.

tendered, Twin City immediately sent nonrenewal notices to more than 3,000 of its policyholders and notified its network of 150 agent producers of its intent to withdraw. Only after the Commissioner obtained injunctive relief against Twin City (Resp.A-1 to A-11) were the notices rescinded and a plan for orderly withdrawal submitted consistent with the new statute for the Commissioner's review.

Twin City's proposed withdrawal plan was remarkably selective. In particular, Twin City sought to withdraw *only* from the New Jersey private passenger insurance business and retain authority to transact business in all other lines, including its *commercial* policies. As submitted, the plan also proposed that Twin City's affiliates all retain their New Jersey licenses, thus enabling them to continue reaping the profits of other lucrative property/casualty lines, including Hartford Underwriters' cherished endorsement to insure drivers through the AARP. Also, unlike certain other carriers that had requested the State's approval to withdraw from New Jersey as part of a nationwide corporate program to stop writing automobile insurance altogether, petitioners' intended withdrawal was confined to New Jersey.

C. The Decisions Below

On August 14, 1990, respondent State Insurance Commissioner Samuel Fortunato approved, with modifications, Twin City's withdrawal plan in a 35-page Administrative Decision and Order. (Pet.A-71). In his detailed decision, the Commissioner found that the "New Jersey private passenger automobile insurance market is presently undergoing a period of transition and adjustment in the wake of the enactment of the FAIR Act . . . [.]" (Pet.A-78). To avoid destabilization of that volatile market, the Commissioner determined in his regulatory judgment that Twin City's pullout must not be hasty, disruptive or selective (Pet.A-79, A-82). Accordingly, he imposed several conditions, including the surrender of its affiliates' certificates of authority pursuant to Section 72 of the FAIR Act and a mandate that Twin City satisfy its statutory obligations to write new business and absorb residual

market depopulation quotas until its withdrawal is complete (Pet.A-95). Twin City filed an accelerated appeal, declining to take advantage of the Commissioner's invitation that it request a hearing on any material factual issues it may have disputed. (Pet.A-97).[15]

On June 11, 1991, the Superior Court, Appellate Division unanimously affirmed the Commissioner's Decision and the underlying constitutionality and validity of Section 72 of the FAIR Act on its face and as applied to Twin City. 591 A.2d 1005 (N.J. App. Div. 1991). In its opinion, the Appellate Division specifically rejected Twin City's challenges to the withdrawal order under the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment, finding that the Commissioner's protective effort to adjust "the benefits and burdens of economic life to promote the public good" in the highly regulated insurance industry did not amount to a compensable taking, *id.*, 591 A.2d at 1010, and that the mandated restrictions on Twin City's withdrawal rationally assured the continued service of "a real public need" for automobile insurance. *Id.*, 591 A.2d at 1016. The Appellate Division also dispensed with claims variously raised by ITT Hartford and an industry *amicus* group under the Equal Protection and Commerce Clauses, retroactivity principles, and assorted state-law[16] grounds.

Upon granting certification to Twin City and its affiliates, and entertaining the arguments of the parties and a host of industry *amici*, the New Jersey Supreme Court on July 29,

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[15] While the appeal was pending, the Commissioner modified his administrative order to limit, consistent with the withdrawal statute, the order's surrender provisions to those seven ITT Hartford affiliates that are admitted as property/casualty insurers under "Title 17" of the New Jersey insurance statutes, N.J. STAT. ANN. § 17:32-1 (West 1992), and not those solely authorized to write life/health insurance business under "Title 17B", N.J. STAT. ANN. § 17B:23-1 (West 1992). See 591 A.2d at 1017.

[16] As a procedural nuance, the Appellate Division did remand the matter to permit the Commissioner the opportunity to reexamine his order in light of general withdrawal regulations that he had adopted while petitioner's appeal was pending. 591 A.2d at 1018. The regulations codify factors expressed in the Commissioner's 1990 administrative order. (Resp.A-12).

1992 unanimously affirmed the facial validity of the withdrawal statute and its application by the Commissioner to Twin City and its ITT Hartford affiliates. 609 A.2d 1248 (N.J. 1992). After tracing the history and regulatory context of New Jersey's troubled insurance market leading up to the withdrawal order, the Supreme Court rejected, *seriatim*, all of petitioners' federal constitutional and state-law challenges. In particular, the State Supreme Court ruled that the withdrawal order's "new business" and "affiliate surrender" provisions easily satisfied due process norms, noting that enforcing Twin City's statutory obligations to continue to write new business and help depopulate the residual market pending the effective date of its withdrawal "is not only rational and fair but virtually required," *Id.*, 609 A.2d at 1259. The Court also ruled that the Commissioner's affiliate-surrender mandate[17] responsibly took into account the interdependence of Twin City and its corporate affiliates,[18] 609 A.2d at 1259. The Court found the surrender requirements "substantially advanced" legitimate and important state interests by generally discouraging withdrawals by automobile insurers in a "period of regulatory turmoil and uncertainty" and by inducing other multi-line carriers to remain in the State through making available to them the more lucrative business of

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[17] The Court acknowledged that Twin City and its affiliates had limited its attack in the Supreme Court on the withdrawal order's "forfeiture" provision to the Takings Clause, *see* 609 A.2d at 1257-58, but it nonetheless prudentially considered – and sustained – the constitutionality of that provision under substantive due process principles as well. *Id.* at 1259-60.

[18] Recognizing ITT Hartford's ultimate ownership and corporate control, the common agents and claims personnel serving its affiliates, and the advantageous reinsurance pooling arrangements within the ITT Hartford holding company system, the Supreme Court concluded that "Twin City's interrelationship with its affiliates is indisputably sufficient to justify a regulatory approach that treats them pragmatically as a single entity." 609 A.2d at 1259. Hence, "[w]hether Twin City and its affiliates operate as a division of a single corporation or as subsidiary corporations of an integrated insurance holding company, a responsible regulation could hardly ignore their common ownership and operational interdependence." *Id.* In light of these state court findings of corporate integration and interdependence, petitioners' continued attempts to portray Twin City and its ITT Hartford affiliates to this Court as detached corporate entities should not be given credence.

withdrawing auto insurers and their affiliates. *Id.*, 609 A.2d at 1259-1260. The Court also extensively analyzed and rejected, under established standards for regulatory takings as expressed in the opinions of this Court, petitioners' claims under the Takings Clause, noting that the "public interest advanced by the [withdrawal] regulation substantially outweighs its adverse effect" on petitioners, and did not impermissibly interfere with their "reasonable investment-backed expectations" in the pervasively-regulated State insurance industry. 609 A.2d at 1265. For related reasons, the Court also declared the "unconstitutional conditions" doctrine unavailing to petitioners. *Id.* at 1265-66. Finally, the Court found no merit in other constitutional claims raised by petitioners and the *amici* under the Equal Protection and Commerce Clauses. *Id.* at 1260-61.

SUMMARY OF ARGUMENT

Petitioners' constitutional challenges to the State's regulation of their intended withdrawal from New Jersey's problem-plagued automobile insurance market were fully considered and soundly rejected by the state appellate courts below, consistent with substantive Due Process and Takings Clause principles previously enunciated by this Court. As petitioners initially concede, their attacks on the State's withdrawal statute and its administrative enforcement are substantively measured under the Due Process Clause by the minimal "rational basis" test for economic regulation that this Court established decades ago, a deferential test that is especially appropriate in the realm of the States' exclusive oversight of the business of insurance. For the reasons detailed in the opinions below, the so-called "mandatory new business" and "forfeiture" conditions that the State imposed on petitioners' withdrawal easily satisfy that standard. Those measures are rationally designed to protect policyholders that must depend on continued automobile insurance coverage, and to abate the disruptive consequences of selective, precipitous, or cumulative withdrawals from the State's insurance market in a time of regulatory crisis while sweeping legislative reforms are

being implemented to address that crisis. The novel "right of exit" theories petitioners subsequently espouse in an effort to alter that constitutional analysis under settled Due Process precepts should not be entertained in this context.

Further, petitioners' claims that the State has unconstitutionally confiscated their property fail under this Court's established three-part test for analyzing non-physical regulatory takings. In particular, petitioners – who have enjoyed for years the benefits of the State's highly-regulated insurance market – are assured under state law the right to earn a fair return on their policies through the ratemaking process if they choose to remain, and there are no record findings below that they will suffer a "total deprivation" of the economically viable uses of their property if they choose to depart. Under New Jersey's long-standing licensure statutes and decisional law, petitioners could have no reasonable investment-backed expectations that they would have an unfettered right to withdraw selectively from the State insurance market on their own terms. Hence, their claims under the Takings Clause were properly denied. Lastly, in spite of petitioners' efforts to portray this case as indicative of some nationwide trend by State insurance regulators to impose onerous withdrawal conditions, there are no conflicts among the federal circuit or state appellate courts on such issues that the Court need address in this case.

REASONS FOR DENYING THE WRIT

I. This Court's Review Is Not Required Because The New Jersey Courts Properly Applied This Court's Well-Established "Rational Basis" Test for Economic Regulation In Determining That The Withdrawal Statute and The Commissioner's Order Satisfy Constitutional Principles of Substantive Due Process

Petitioners first complain that the withdrawal provisions of the FAIR Act and, in particular, the "forfeiture" and "mandatory new business" conditions that the Insurance Commissioner has imposed upon Twin City's withdrawal pursuant to the statute, violate norms of substantive due process under the

Fourteenth Amendment. These claims are without merit. The New Jersey statute and administrative order clearly are rationally designed to serve legitimate public interests in the special realm of state insurance regulation, and thus easily satisfy this Court's well-settled "rational basis" test for reviewing such economic regulation under the Due Process Clause.

A. As Petitioners Concede, The Deferential "Rational Basis" Test Governs Judicial Review of A State's Economic Regulation, Especially Concerning The Business of Insurance

In accordance with long-standing substantive due process precedents of this Court, if state economic regulation is supported by a conceivable rational basis in serving a legitimate public purpose, it will be sustained as constitutional. *Duke Power v. Carolina Envtl. Study Group*, 438 U.S. 59, 82-84 (1978); *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963); *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955). The appropriateness of utilizing such a deferential standard of judicial review is underscored in the specific context of the regulation of insurance, "a business to which the government has long had a 'special relation'," *California State Auto Ass'n v. Maloney*, 341 U.S. 105, 109 (1951). Further, through the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, Congress has expressly and uniquely reposed in the states the exclusive power to regulate the business of insurance.

Petitioners expressly, and rightly, concede (Pet.11)[19] that the "rational basis" test of substantive due process governs here, but quarrel with the state courts' analysis in applying that well-settled test. Such quarreling does not justify this Court's intervention, as the extensive reasoning of the New

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[19] Despite this initial concession, petitioners obliquely suggest in the body of their argument that some heightened scrutiny is appropriate where an asserted "right-of-exit" is involved, *see* Pet.10, n.10, a novel claim that, for the reasons shown, *infra*, at Point I(A)(2), is unavailing.

Jersey Supreme Court and Appellate Division amply demonstrates the important public purposes furthered by the withdrawal statute and its application to petitioners. Quite simply, the statute and the Commissioner's order protect New Jersey policyholders from the harm and disruption that would surely be caused if the insurance companies upon which those drivers have become dependent for legally-mandated coverage could unconditionally pull out of their state in a time of acute market instability.

1. The State Has Not Unconstitutionally Compelled Petitioners to Engage In A New Business

Petitioners erroneously contend that the State has forced them to write private passenger automobile insurance in New Jersey. (Pet.12-13). That is not so. To the contrary, the administrative order leaves ITT Hartford with the choice of *continuing* to serve New Jersey's private passenger auto market with an assured opportunity to earn reasonable profits *or* departing from the State altogether in a manner that minimizes disruption and enhances the market climate for those carriers that do remain. Unlike the case of *Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583 (1926) upon which petitioners rely (Pet.10-12), the State here has not required a private enterprise to provide a service to the public that it had never before supplied.[20] Rather, the State has merely regulated the conditions under which a carrier may discontinue a line of business that it has already been providing of its own volition.[21]

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[20] *Cf. Hartford Accident & Indem. Co. v. Ingram*, 226 S.E.2d 498 (N.C. 1976) (declaring unconstitutional North Carolina statute that required all general liability insurers in State to *begin* offering medical malpractice coverage).

[21] Petitioners nevertheless point to *Frost* as authority for the proposition that this choice amounts to an unconstitutional condition. That argument is without merit.

The unconstitutional condition doctrine holds generally "that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Sullivan, *Unconstitutional Conditions*, 102 Harv.L.Rev. 1413, 1415 (1989). In

Nor does this case, as petitioners wrongly contend, implicate recent *dictum* of this Court in *Yee v. City of Escondido*, 503 U.S. ___, 112 S.Ct. 1522, 1529 (1992). In *Yee*, the Court noted in passing that the case under review, one involving the constitutionality of a rent control ordinance, would be different if it compelled a landlord to rent his property to a particular tenant "in perpetuity." However, here, as in *Yee*, no perpetual obligation has been imposed; the Commissioner's administrative order simply requires Twin City to remain in New Jersey for a transition period of up to five years, a period that Twin City itself can shorten by arranging a replacement carrier to absorb its automobile policyholders. (Pet.A-81).[22]

Frost, the Court held that a state could not condition the use of public highways by private businesses upon their acceptance of common carrier status. But *Frost* was decided in 1926, when "[d]irect imposition of such liability on a private carrier would have violated *then-prevailing doctrines of substantive due process. Cf. Lochner v. New York*, 198 U.S. 45, 56 (1905) (striking down a statute limiting bakers' work hours as violative of the Fourteenth Amendment)." Sullivan, *supra*, at 1430, n.52 (emphasis added). There is no analogous, modern constitutional right being infringed upon in this case, despite petitioners' novel argument that corporations enjoy a constitutionally protected "right of egress". See Point I(A)(2), *infra*, at 16-17.

Furthermore, even if petitioners could successfully argue that the choice presented them by the State of New Jersey implicated some constitutional right, such a finding would not be dispositive of the question of whether the State had imposed an unconstitutional condition. "[T]he doctrine of unconstitutional conditions does not mean that no conditions can ever be attached to the doing of business or the exercise of a conditional right . . . [.] The task of an adequate theory of unconstitutional conditions is to figure out which conditions may be attached to what privileges and why." Epstein, *Takings: Descent and Resurrection*, 1987 *Sup.Ct.Rev.* 1, 35.

[22] In any event, *Yee* – which sustained the rent control ordinance at issue under the Takings Clause – did not even reach the substantive due process issue, which had not been addressed by the lower courts in that case. 112 S.Ct. at 1531.

Further, there is no clash, as petitioners suggest (Pet.14 n.11), between the New York Court of Appeals' opinion in *Seawall v. City of New York*, 542 N.E.2d 1059 (N.Y.), *cert. denied*, 493 U.S. 976 (1989), and the New Jersey state courts' disposition of *Twin City*. *Seawall* involved a physical taking occasioned by a unique city ordinance compelling owners of single-room-occupancy ("SRO") hotels to, among other things, rehabilitate all of their *vacant* units and offer them for rent *indefinitely*. The challenged statutory provisions would have served to "place[ ] petitioners in a business, force[ ] them to remain in that business and refuse[ ] to

2. Petitioners' Novel "Corporate Right of Egress" Theory Does Not Warrant This Court's Review Nor Negate The Rational Bases Sustaining The State's Regulation

Petitioners next fashion a novel theory asserting that businesses enjoy some exalted right of "egress" or "exit" from a State's borders. There is no such right, at least with respect to corporations such as ITT and its ITT Hartford insurance affiliates, that should alter conventional due process analysis of the kind of economic regulation at issue here.

While individual citizens no doubt enjoy the constitutional right to travel from state to state, this Court has not extended constitutional protection of such a personal right to corporations. *See, e.g., Williams v. Fears*, 179 U.S. 270, 274 (1900) ("Undoubtedly, the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of *personal liberty*") (emphasis added); *see also Shapiro v. Thompson*, 394 U.S. 629-30 (1969) ("the nature of our Federal Union and our constitutional concept of *personal liberty* united to require that *all citizens be free to travel* throughout the length and breadth of our land . . . ") (emphasis added); Rotunda & Nowak, *Treatise on Constitutional Law: Substance and Procedure* 2d, § 15.7 (1992) ("[t]he right to travel has a long history of recognition as a right to *personal mobility*") (emphasis added); *Tatem v. Wright*, 23 N.J.L. 429, 446 (Sup. Ct. 1852) (individual's protected right to travel under Privileges and Immunities

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allow them to ever cease doing [that] business." 542 N.E.2d at 1068 (citation omitted). Here, by contrast, Twin City and its affiliates are not required to dedicate their already-established business operations "indefinitely" to new uses, nor is this a physical takings case. See Point II, *supra*, at p. 24. Moreover, the absence of an adequate nexus between the city ordinance at issue in *Seawall* and that ordinance's professed goal of helping the homeless is markedly distinguishable from the strong nexus found by the state courts in *Twin City* between New Jersey's withdrawal regulations and the legitimate aims of protecting insured citizens from the dislocations directly caused by such withdrawals. But, even assuming, *arguendo*, the state courts' approaches in *Seawall* and *Twin City* cannot be reconciled, that isolated difference alone hardly warrants this Court's *certiorari* review.

Clause is founded on desire "to secure and perpetrate mutual friendship and intercourse among the people of the different states" and hence is inapplicable to corporations). Although petitioners cite some law review articles and other scattered authorities in advocating that businesses enjoy constitutional "exit rights", it is clear that this Court has yet to embrace the proposition, and respondent submits that this case is not the proper vehicle to consider such a doctrine without the benefit of further jurisprudential treatment in the federal and state courts.

Even if, however, this Court were to equate a natural person's right to travel with a business corporation's interest in entering or "exiting" a State, the existence of such a right should not alter the rational-basis analysis that supports New Jersey's regulation of withdrawing insurance companies. No higher scrutiny under the Due Process Clause is nor should be triggered merely because an asserted right of egress is implicated by economic regulation.[23]

3. Petitioners' Allegations of Punitive Intent Do Not Strip The State's Regulatory Measures of Their Rational Underpinnings

Alluding to press reports of statements of the Governor of New Jersey, petitioners argue that they are being unfairly "punished" for attempting to withdraw from the New Jersey automobile insurance market. Petitioners go on to accuse the New Jersey Supreme Court of, in effect, condoning the State's political oppression of insurance companies by using "[a]rtful

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[23] Petitioners cite (Pet.12 n.10) this Court's opinion in *Nordlinger v. Hahn*, 505 U.S. ___, 112 S.Ct. 2326, 2332 (1992) for the proposition that "the right to travel enjoys heightened scrutiny under the *Equal Protection Clause*." (Emphasis added). In fact, the Court determined that plaintiff in *Nordlinger* lacked standing to raise a right to travel issue and thus did not reach the question of the proper level of scrutiny such an issue requires. Moreover, *Nordlinger* and the right-to-travel cases it does cite, are all *Equal Protection* cases. Here, petitioners have not presented to this Court any constitutional claims that New Jersey violated their Equal Protection rights, apparently abandoning the Equal Protection arguments they unsuccessfully pressed in the state courts below. See 591 A.2d at 1016-17; 609 A.2d at 1260-61.

language" and "euphemisms" in the Court's opinion to sustain the withdrawal statute and the Commissioner's order as a valid exercise of police powers. (Pet.16-17).

Notwithstanding petitioners' assessment of the state judicial process, it remains clear that the withdrawal statute and the Commissioner's order – viewed objectively on their merits – have ample justification in the protection they afford New Jersey policyholders to satisfy the rational-basis test of constitutionality. The strong deterrent character of the State-imposed conditions on Twin City's withdrawal is eminently rational in the context of New Jersey's particularly turbulent automobile insurance market. As the Supreme Court aptly put it, "[i]n such a period of regulatory turmoil and uncertainty, nothing short of severe regulatory measures imposed on private-passenger insurers threatening to withdraw – in other words, strong medicine – would be effective." *Twin City*, 609 A.2d at 1259-60. Moreover, the "affiliate-surrender" and "new-business" conditions of withdrawal objected to by petitioners are fully consistent with the general withdrawal regulations that the State has adopted pursuant to the statute, disproving any notion that petitioners have been unfairly "singled out."[24] In sum, the State's protective regulatory measures at issue here were obviously not, as petitioners claim, founded upon "[a] bare desire 'to harm a politically unpopular group' " (Pet.16), and remain constitutionally valid.[25]

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[24] See N.J. Admin. Code 11:2-29.3(c) (Resp.A-19) and 11:2-29.5(a)(2) (Resp.A-30).

[25] The two cases cited by petitioners in support of their argument that they have been constitutionally discriminated against as a "politically unpopular group" are inapposite.

In *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Court considered a legislative amendment "intended to prevent so-called 'hippies' and 'hippie communes' from participating in the [federal] food stamp program." Not surprisingly, the Court found the amendment "wholly without any rational basis," 413 U.S. at 538, and ruled that " '[a] purpose to discriminate against hippies cannot *in and of itself and without reference to [some independent] consideration in the public interest, justify the . . . amendment*,' " 413 U.S. at 534-35 (citation omitted; emphasis added). No matter whether insurance companies are as unpopular in the

B. The "Affiliate-Surrender" and "New Business" Conditions of the Withdrawal Order Have a Strong Rational Nexus to Valid Statutory Purposes

Exporting this Court's Takings Clause analysis in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836-37 (1987) to a substantive-due-process context, petitioners argue that there must be a "nexus" between conditions imposed by the government and the regulatory purposes under which those conditions are imposed. (Pet.18). Assuming, *arguendo*, that the Court's "nexus" test in *Nollan* even applies to substantive due process analysis, the State Supreme Court correctly found that the "affiliate surrender" and "new business" facets of the Commissioner's order have such a nexus to the aims of the withdrawal statute.

As to the so-called "mandatory new-business" aspect of the administrative order, the plain language of New Jersey's withdrawal statute expressly declares that "[t]he certificate of authority of the company shall be deemed to *continue in effect* until the provisions of the approved [withdrawal] plan are carried out." N.J. STAT. ANN. § 17:33B-30 (West 1992). (Emphasis added)[26] Thus remaining a licensed New Jersey

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1990's as hippies were with some lawmakers in the early 1970's, petitioners can hardly contend that their alleged unpopularity was the sole motivation behind the FAIR Act. Indeed, the Supreme Court rejected similar claims by other insurers that the FAIR Act represents a legislative and gubernatorial effort to punish insurance companies in violation of the Constitution's Bill of Attainder Clause. *State Farm v. State*, 590 A.2d 191, 208-209 (1991).

The relevance of *Medora v. Colautti*, 602 F.2d 1149 (3d Cir. 1979), is equally elusive. There, the Third Circuit looked at a Pennsylvania welfare system barring "all aged, blind, or disabled persons from receiving general assistance, including those who are in fact needy under the Pennsylvania welfare code yet ineligible for benefits under the federal program." 602 F.2d at 1151. The court found that Pennsylvania's system did not rationally further any legitimate governmental interests. Here, by contrast, the State's regulatory actions have ample rational underpinnings.

[26] In this respect, New Jersey's withdrawal statute markedly differs from California's withdrawal provisions, which provide that a departing insurer surrender its certificate to do business as the first step of the withdrawal process, thereby

insurer by operation of law until its withdrawal is complete, Twin City continues to have the rights and obligations under state law held by all other licensed carriers. These obligations include general statutory directives for automobile insurers to write policies for all qualified applicants who meet pertinent underwriting criteria, see N.J. STAT. ANN. § 17:33B-15 (West 1992) ("take-all-comers" provision), and to satisfy regulatory quotas to depopulate the residual market as required by strict legislative deadlines, *see* N.J. STAT. ANN. § 17:33B-11 (West 1992) (depopulation). Fairly described, the order does not so much mandate "new" business as it does business-as-usual under the prevailing laws. As the State Supreme Court observed, the withdrawal order's "new-business condition" enforcing these obligations is not only eminently rational and fair, but "compelling":

> Viewed against the backdrop of New Jersey's chronic difficulties in assuring coverage for sub-standard private-passenger automobile insureds, the justification for imposing that [new business] condition on Twin City's right to withdraw is *not merely rational, it is compelling.* To the extent Twin City's contention addresses the obligation to renew existing policies during its five-year withdrawal process, that obligation is hardly an onerous one. As it withdraws over a five-year period, Twin city must either place its existing policies with other carriers or renew them in order that its insureds not be disadvantaged by its withdrawal. We sustained an analogous requirement in *Sheeran*, *supra*, 80 N.J. at 561, 404 A.2d 625, and entertain no doubt about its reasonableness or its validity.
>
> We are also convinced that due process is not offended by the Commissioner's requiring Twin City to comply, during its withdrawal period, with the Reform Act's mandate that the shift of insureds from the residual to the voluntary market be shared

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immediately altering the company's licensure status. *Cf. Travelers Indemnity Co. v. Gillespie*, 785 P.2d 500 (Cal. 1990).

> equitably by all insurers. . . . New Jersey's extraordinary difficulties with assigned-risk drivers, resulting in the JUA's staggering deficit, provoked the Reform Act's mandatory residual-market depopulation provisions. *State Farm, supra,* 124 N.J. at 41-42, 590 A.2d 191. Because the Act requires all insurers to participate equitably in the shift from the residual to the voluntary market, see N.J.S.A. 17:30E-14, *the Commissioner's imposition of that statutory obligation as a condition of Twin City's withdrawal is not only rational and fair but virtually required by the Act.* That an insurer who enjoyed profitable operations during the pre-Reform Act period could abandon entirely the remedial burdens imposed by the Act on all private-passenger insurers would be inequitable.

Id., 609 A.2d at 1258-59 (emphasis added).[27]

Petitioners also attempt to resurrect before this Court an argument they failed to assert, *see* 609 A.2d at 1259, before the State Supreme Court: that the "affiliate surrender" (or so-called "forfeiture") aspect of the withdrawal order lacks a rational nexus to valid public purposes and thus violate substantive due process norms. Again, the Supreme Court's analysis below succinctly refutes any such argument of irrationality:

> As the Commissioner's order observed, the withdrawal of any private-passenger insurers in the current difficult regulatory climate increases the burdens on those insurers who remain, burdens attributable to the more favorable regulatory conditions enjoyed by Twin City before the passage of the Reform Act. Other private-passenger insurers have also sought withdrawal, following Twin City's

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[27] The fact that Twin City's private passenger book of business has risen since the FAIR Act was adopted (see Pet.6 n.5, 18) is but a natural consequence of adhering to nondiscriminatory underwriting practices and short-term residual market depopulation responsibilities shared by other licensed New Jersey automobile insurers pursuant to that statute. If Twin City and other companies were permitted to shirk those responsibilities merely by filing withdrawal applications, the burdens would be compounded for those that remain and the market even further disrupted.

> example. In such a period of regulatory turmoil and uncertainty, nothing short of severe regulatory measures imposed on private-passenger insurers threatening to withdraw – in other words, strong medicine – would be effective. *If the forfeiture condition discourages withdrawal, a substantial State interest – retention of private-passenger insurers – will have been advanced. If it fails to discourage Twin City's withdrawal, the availability for acquisition of its affiliates' insurance business may operate as an inducement to other multi-line carriers to remain in New Jersey, thereby advancing an analogous and equally substantial State interest.*

609 A.2d at 1259-1260. (Emphasis added). Accordingly, the Supreme Court concluded that the affiliate-surrender provision would readily meet the *Nollan* "nexus" test (if it were applicable) by "substantially advancing the legitimate state interest sought to be achieved." *Id., quoting Nollan, supra,* 483 U.S. at 834 n.3.

Petitioners' argument to this Court (Pet.18) that the affiliate surrender provision is counterproductive because it forces ITT Hartford's affiliates to stop writing automobile insurance, including their valued AARP accounts, ignores the Commissioner's regulatory judgment that selective withdrawals that attempt to "skim the cream" of the market are more disruptive than the wholesale surrender of an integrated carrier's entire book of business. The exercise of such administrative expertise is entitled to judicial deference, *see, e.g., Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 108 (1983) (in finding that a decision by the Nuclear Regulatory Commission was neither arbitrary nor capricious, the Court relied in part on the fact that the Commission was operating within "its area of special expertise.")[28], especially in the highly regulated insurance arena.

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[28] *See also Environmental Protection Agency v. National Crushed Stone Association*, 449 U.S. 64 (1980); *Rybachek v. United States Environmental Protection Agency*, 904 F.2d 1276 (9th Cir. 1990).

Accordingly, the Commissioner's "judgment call" readily satisfies the minimum rationality standards of the Due Process Clause.[29]

II. The Courts Below Correctly Held That the State's Regulatory Action, Which Involves Neither A Physical Taking Nor the Total Deprivation of Petitioners' Property, Did Not Violate The Takings Clause Under Standards Previously Enunciated By This Court

Applying the controlling Fifth Amendment standards previously enunciated by this Court, the State appellate courts concluded that the State's regulation of petitioners' withdrawal from the automobile insurance market did not amount to a compensable taking of their property. That conclusion was properly reached, particularly in this context involving no physical taking and no finding of a total deprivation of the

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[29] Straining to find a wide-ranging jurisprudential reason for this Court to grant review, petitioners assert that New Jersey's regulation of withdrawing insurers poses "a national threat to economic liberty and free enterprise." (Pet.18). In support of this sweeping claim, petitioners note that two states, Maine and Massachusetts, also have regulatory provisions that deal with certain aspects of insurer withdrawals, while another state, Iowa, has adopted an administrative regulation purporting to require the withdrawal of financially-troubled insurers domesticated in Iowa from other states where they are losing money. (Pet.10, n.9). The Massachusetts withdrawal statute was constitutionally sustained over 15 years ago by that State's highest court, *see Maryland Casualty Co. v. Commissioner of Insurance*, 363 N.E.2d 1087 (Mass. 1977), in an opinion fully consistent with the analysis of the New Jersey courts in *Twin City*. The validity of the Maine law, meanwhile, is the subject of active litigation that primarily focuses on Maine's special formula for apportioning deficits in its residual market for worker's compensation insurance, and has not yet generated any appellate opinions that theoretically might offer any differing perspectives. Further, the Iowa regulation is a unique provision that was adopted in reaction to California's 1988 mandatory rollback of insurance rates, a measure that itself was ultimately invalidated, *Calfarm Insurance Co. v. Deukmejian*, 771 P.2d 1247 (Cal. 1989), by the California courts. *See* Commentary, "Iowa Official Challenges Conclusion About State Insurer Rate/Withdrawal Regulations," 10 Journal of Insurance Regulation 251 (1991). There is no evidence that the Iowa regulation has ever been enforced in its narrow insolvency context or tested in litigation.

These sporadic developments in a handful of states do not rise to the level of a national legal issue ripe for this Court's review.

beneficial or productive uses of petitioners' property, and does not warrant this Court's review.

A. The Courts Below Properly Found No Compensable Taking Caused By The State's Regulatory Actions Under This Court's Settled Three-Part Test In Cases Not Involving Physical Invasions Or Land

Traditionally this Court has approached claims of governmental confiscation under the Takings Clause of the Fifth Amendment with far less scrutiny when the alleged taking does not involve the physical invasion or arrogation of real property. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *see also Keystone Coal v. DeBenedictis*, 480 U.S. 470 (1987) (restriction of mining on private land); *Agins v. Tiburon*, 447 U.S. 255 (1980) (rezoning of private residential property). This past Term, the Court reaffirmed in *Yee v. Escondido*, *supra*, 112 S.Ct. at 1528, and in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886 (1992), the greater constitutional burden on plaintiffs in "regulatory takings" cases not involving physical invasions or land. Since no physical invasion or taking of ITT Hartford's real property has occurred, petitioners' Takings Clause claims are properly analyzed under less stringent precepts of compensation.

The determination of whether a governmental regulation limits the use of private property to such a degree that it constitutes a "taking" is highly fact-specific. *Connolly v. Pension Benefit Guaranty Corp.*, 476 U.S. 211, 224 (1986) (holding that governmentally-imposed financial disincentives to withdraw from a pension plan do not effect an unconstitutional taking). This Court has identified three well-established factors relevant to such factual inquiries: (1) the character of the governmental action; (2) its economic impact; and (3) its interference with reasonable investment-backed expectations. *Id.* at 225. Given these factors, the courts below properly concluded that there has not been a taking for which compensation is due in this case.

The first "takings" factor, the character of the governmental action, weighs heavily in favor of sustaining the withdrawal statute and order. As noted, *supra* at p. 24, there has been no physical invasion or permanent appropriation of Twin City's assets for the State's own use. *See Connolly, supra*, 476 U.S. at 225. The withdrawal statute is an integral part of the New Jersey's comprehensive revision of its automobile insurance system. As such, it "arises from a public program that adjusts the benefits and burdens of economic life to promote the common good" and therefore is not a "taking" requiring governmental compensation. *Id.* In this regard, the State Supreme Court aptly recognized below that the "forfeiture condition was a forceful but relevant regulatory measure imposed to advance the substantial State interest in discouraging Twin City's withdrawal from the private-passenger automobile market, as well as the State's interest in encouraging other multi-line carriers to continue in that market." *Twin City*, 609 A.2d at 1263.

The second factor, the economic impact of the regulation, requires an examination of both the degree of loss suffered and the provisions in the regulatory scheme that would mitigate the loss. *Connolly, supra*, 476 U.S. at 225-26. The asserted negative economic consequences of the Insurance Commissioner's application of New Jersey's withdrawal statute flow from petitioners' own choice to cancel Twin City's New Jersey private passenger lines. Moreover, if Twin City elects to remain in the New Jersey automobile insurance market, any diminution of future profits that it may experience by complying with the FAIR Act temporary surtaxes, assessments, and other obligations is not compensable. As this Court observed in *Andrus v. Allard*, 444 U.S. 51, 66 (1979), the "loss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to rest a takings claim."

Third, the State's regulation of petitioners' withdrawal did not interfere with "reasonable investment-backed expectations." Petitioners are charged with knowledge of the traditional highly regulated nature of the insurance industry. *See California State Auto Ass'n v. Maloney, supra*, 341 U.S. at

109. Indeed, more than a decade before petitioners' attempted pullout of Twin City, the New Jersey Supreme Court held as a general matter that the State Insurance Commissioner had inherent authority to regulate the orderly withdrawal of insurers leaving the States. *Sheeran v. Nationwide Mut. Ins. Co.*, 404 A.2d 625 (N.J. 1979).[30] Thereafter, the Governor of New Jersey in 1987 expressly recommended in a conditional veto of certain insurance reform legislation that the State statutes be amended to expressly vest the Commissioner with the power to require withdrawing insurers to surrender their licenses to conduct other New Jersey business, thus providing, in the words of the Appellate Division, "fair warning" to petitioners' investors that the State might exercise such authority. *Twin City*, 591 A.2d at 1011. Further, petitioners' licenses to do business in New Jersey were always subject to annual renewal and conditioned on the Insurance Commissioner's long-standing statutory authority, dating back to at least 1958, to refuse to renew licenses where "such refusal will best protect the interests of the people of th[e] State[.]" N.J. STAT. ANN. § 17:32-2(d) (West 1992).

Although petitioners may have presumed that the State would not actually impose stringent conditions on their withdrawal from the New Jersey market, reasonable investment-backed expectations under the Takings Clause must amount to more than such a "unilateral expectation." *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980). *See also*

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[30] Foreshadowing the "surrender" aspects of the 1990 withdrawal statute, *Sheeran* endorsed the propriety of the State preventing selective withdrawals by insurers that "refuse to renew their existing policies [in compliance with statutory criteria] and yet retain the ability to insure in the future those customers whom they consider desirable." *Id.*, 404 A.2d at 629. As the Supreme Court then put it, "[s]uch an end run around the statutory scheme cannot be countenanced." *Ibid.* Likewise, the New York state courts recognized in 1978 an insurance regulator's right to take action against withdrawing carriers that selectively "seek to reap the benefits of doing business [in the State] while 'dumping' unprofitable automobile policies, or even all automobile policies, while retaining other presumably profitable areas of insurance coverage[.]" *People ex rel. Lewis v. Safeco Ins. Co.*, 414 N.Y.S.2d 823, 829 (Sup. Ct. 1978). The Commissioner's order at issue here enforces those very same principles.

Lucas v. South Carolina Coastal Council, supra, 505 U.S. at ___, 112 S.Ct. at 2899 ("by reason of the State's traditionally high degree of control over commercial dealings [an owner of personal property] ought to be aware of the possibility that new regulation might even render his property *economically worthless* (at least if the property's only economically productive use is sale or manufacture for sale)") (emphasis added) (citation omitted).

On the whole, the Court's established three-prong test for evaluating regulatory takings claims clearly vindicates New Jersey's withdrawal statute and the Commissioner's administrative order enforcing the statute. There is no reason for this Court to disturb that conclusion here.

B. There Are No Findings of Fact In This Record of A "Total Deprivation" of the Beneficial Uses of Petitioners' Property

Petitioners analogize their circumstances (Pet.A-21) to those presented by the landowner in *Lucas v. South Carolina Coastal Council, supra*, in advocating that New Jersey's economic regulation of their insurance licenses warrants more severe judicial scrutiny under the Takings Clause. However, in *Lucas*, the government's brief opposing the *certiorari* petition did not contest state court findings that there had been a "total deprivation of a beneficial use" of Mr. Lucas' beachfront property resulting from applying its building prohibitions to him. *Id.*, 112 S.Ct. at 2894, 2896. Here, by contrast, there is no concession by the State nor any findings of fact below that petitioners have similarly been "totally deprived" of the beneficial uses of their corporate property. The State Supreme Court presumed that "the surrender by Twin City's affiliates of their respective licenses would *not* necessarily result in the elimination of *all* commercial value inherent in the affiliates' New Jersey business operations, some aspects of which undoubtedly could be applied to business in other states," but declined to speculate on whether ITT Hartford would be able to recoup that loss fully by diverting its marketing efforts to other States. 609 A.2d at 1264 (emphasis added). Moreover, the Supreme Court noted that "[t]he record

does not indicate whether the [ITT Hartford] affiliates could sell or otherwise receive compensation from other insurers interested in succeeding to lines of business written [in New Jersey] by one or more of Twin City's affiliates." *Id.*

Respondent submits that petitioners have not established any "total" deprivation of their property resulting simply from the discontinuation of their affiliates' legal authority to do business in this State if they choose to proceed with Twin City's withdrawal; their capital investment in New Jersey can surely be diverted, at least to some degree, to other productive uses. Conversely, if petitioners choose to remain in New Jersey, state law assures them of a continued right to earn a fair rate of return from their insurance lines. N.J. STAT. ANN. § 17:33B-2(g); *State Farm v. State*, 590 A.2d 204 (1991). In either event, because there is no "total deprivation" here, the "categorical rule" of compensation triggered by total deprivations in physical invasion or real property cases would have no application here, even if the Court were inclined to change the law and treat regulatory taking cases not involving real property on a par with physical taking cases.

CONCLUSION

For all of the above reasons, as amplified in the detailed opinions of the New Jersey Supreme Court and Appellate Division, the State's public-interest regulation of petitioners' withdrawal from the New Jersey automobile insurance market does not violate constitutional principles of substantive due process and regulatory takings under this Court's established standards for reviewing such State economic measures. There are no broad-based conflicts of law among the lower courts that the Court need to resolve in this matter, one which arises in the distinctive context of the States' exclusive province to regulate the business of insurance. Accordingly, respondent

respectfully urges that the petition for a writ of certiorari be denied.

Respectfully submitted,

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- and -

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Dated: December 28, 1992

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION – MERCER COUNTY
DOCKET NO. C90-0201

JASPER J. JACKSON, Acting Commissioner, New Jersey Department of Insurance, Plaintiff, v. TWIN CITY FIRE INSURANCE COMPANY, an Indiana Corporation; HARTFORD FIRE INSURANCE COMPANY, A Connecticut Corporation; ITT HARTFORD GROUP, INC., a Connecticut Corporation; and DALE RAYMOND COMEY, President of Twin City Fire Insurance Company, Hartford Fire Insurance Company and ITT Hartford Group, Inc., Defendants.	Civil Action ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS (Filed March 15, 1990)

This matter having been opened to the Court pursuant to *R.* 4:52-1, upon the filing of a Verified Complaint by Jasper J. Jackson, Acting Commissioner of Insurance of the State of New Jersey (Douglas S. Eakeley, Acting Attorney General of New Jersey, for Plaintiff; Stephen P. Tasy, Deputy Attorney General, appearing) in the presence of Wesley S. Caldwell, III, Esq., attorney for Defendants, Twin City Fire Insurance Company, Hartford Fire Insurance Company, ITT Hartford Group, Inc.; and

IT APPEARING to the Court from the Verified Complaint and Affidavit filed in this matter that Defendant Twin City Fire Insurance Company ("Twin City") through its parent companies, Defendants Hartford Fire Insurance Company and ITT Hartford Group, Inc; and their President, Dale Raymond Comey, attempted to surrender its Certificate of Authority to write private passenger automobile insurance in the State of New Jersey; and

IT FURTHER APPEARING that Defendants issued a notice to Twin City's New Jersey insurance producers advising said producers of Twin City's intent to withdraw from the private passenger automobile insurance market in the State of New Jersey; and

IT FURTHER APPEARING that Defendants' actions were in violation of the law of New Jersey governing the orderly withdrawal of foreign insurers from New Jersey insurance markets, *N.J.S.A.* 17:32-13, as revised by the Fair Automobile Insurance Reform Act of 1990, and for good cause shown;

IT IS, on this 15th day of March, 1990;

1. ORDERED that Defendants are temporarily restrained until the return date of this order to show cause or other order of the court from:

a. Surrendering defendant Twin City's Certificate of Authority to write private passenger automobile insurance and other lines of insurance in New Jersey, until such time as defendants file with, and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for orderly withdrawal of Twin City from the New Jersey automobile insurance and property/casualty markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal, as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13;

b. Discontinuing the writing, by Twin City, and those acting on Twin City's behalf, of private passenger automobile insurance and other lines of insurance in New Jersey, until such time as defendants file with and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for orderly withdrawal of Twin City from the New Jersey automobile insurance and property/casualty markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13;

c. Discontinuing the renewals by Twin City, and those acting on Twin City's behalf, of private passenger automobile insurance and other lines of insurance in New Jersey until such time as defendants file with and receive

approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for the orderly withdrawal of Twin City from the New Jersey automobile insurance and property/casualty markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13;

d. Attempting, in any manner or form, to effectuate the withdrawal of Twin City from the private passenger automobile insurance and property/casualty markets in New Jersey until such time as defendants file with and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for the orderly withdrawal of Twin City from those markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal, as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13;

e. Defendants shall immediately rescind the March 8, 1990 letter notifying Twin City's New Jersey insurance producers of its intent to withdraw from the New Jersey markets.

2. ORDERED further, that defendants show cause before the Superior Court of New Jersey, Chancery Division, on the 29th day of March, 1990 at 9:00 a.m. or as soon thereafter as counsel may be heard, why an Order providing for an interlocutory injunction should not be entered against defendants to be effective during the pendency of this suit, and until final hearing and entry of judgment, as follows:

a. Enjoining defendants from surrendering defendant Twin City's Certificate of Authority to write private passenger automobile insurance and other lines of insurance in New Jersey, until such time as defendants file with, and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for orderly withdrawal of Twin City from the New Jersey automobile insurance and property/casualty markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal, as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13;

b. Enjoining defendants from discontinuing the writing, by Twin City, and those acting on Twin City's behalf, of private passenger automobile insurance and other lines of insurance in New Jersey, until such time as defendants file with and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for orderly withdrawal of Twin City from the New Jersey automobile insurance and property/casualty markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13;

c. Enjoining defendants from discontinuing the renewal, by Twin City and those acting on Twin City's beahlf [sic] of private passenger automobile insurance and other lines of insurance in New Jersey until such time as defendants file with and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for the orderly withdrawal of Twin City from

the New Jersey automobile insurance and property/casualty markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal as required by The Fiar [sic] Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13;

d. Enjoining defendants from attempting, in any manner or form, to effectuate the withdrawal of Twin City from the private passenger automobile insurance and property/casualty markets in New Jersey until such time as defendants file with and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for the orderly withdrawal of Twin City from those markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal, as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13;

e. Requiring defendants if they seek to withdraw as aforesaid to submit to the Commissioner of Insurance, for his approval, a plan for the orderly withdrawal of Twin City from the New Jersey private passenger automobile insurance and property/casualty markets, as mandated by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13;

f. Requiring defendants if they seek to withdraw as aforesaid to fully implement and comply with the plan of withdrawal approved by the Commissioner of Insurance, as mandated by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13;

g. Requiring defendants to rescind the March 8, 1990 letter notifying Twin City's New Jersey insurance

producers of its intent to withdraw from the New Jersey insurance markets.

3. ORDERED that this Order to Show Cause shall constitute process, and that defendants shall serve and file their answer upon plaintiff's attorney and the Clerk of the Court as provided by the Rules of this Court within 20 days from the date, hereof and if defendants fail to so serve and file their answer judgment by default may be rendered against them for the relief demanded in the Verified Complaint.

4. Briefs shall be filed with the Court no later than 3 days before the return date hereof.

/s/ Samuel D. Lenox Jr.
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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION - MERCER COUNTY
DOCKET NO. C90-0037

JASPER J. JACKSON, Acting Commissioner, New Jersey Department of Insurance, Plaintiff, v. TWIN CITY FIRE INSURANCE COMPANY, an Indiana Corporation; HARTFORD FIRE INSURANCE COMPANY, A Connecticut Corporation; ITT HARTFORD GROUP, INC., a Connecticut Corporation; and DALE RAYMOND COMEY, President of Twin City Fire Insurance Company, Hartford Fire Insurance Company and ITT Hartford Group, Inc., Defendants.	Civil Action ORDER GRANTING PRELIMINARY INJUNCTION (Filed April 17, 1990)

This matter having been opened to the Court pursuant to *R.* 4:52-1, upon the filing of a Complaint by Jasper J. Jackson, Acting Commissioner of Insurance of the State of New Jersey (Douglas S. Eakeley, Acting Attorney General of New Jersey, Attorney for Plaintiff; Stephen P. Tasy, Deputy Attorney General, appearing) in the presence of Wesley S. Caldwell, III, Esq., attorney for defendants, Twin City Fire Insurance Company, Hartford Fire Insurance Company, ITT Hartford Group, Inc.; and

The Plaintiff Jasper Jackson, Acting Commissioner of the New Jersey Department of Insurance, having applied to this Court for a preliminary injunction against defendants, and

The Court having considered the submissions and arguments of the parties, and for good cause shown;

IT IS on this 17th day of April, 1990;

ORDERED that defendants are hereby preliminarily enjoined as follows:

a. Defendants shall not surrender defendant Twin City's Certificate of Authority to write private passenger automobile insurance and other lines of insurance in New Jersey, until such time as defendants file with, and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for orderly withdrawal of Twin City from the New Jersey automobile insurance and property/casualty markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal, as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.*

17:32-13, or until a contrary order is granted by the Final Judgment in this matter.

b. Defendants shall immediately continue the writing, by Twin City, and those acting on Twin City's behalf, of private passenger automobile insurance and other lines of insurance in New Jersey, until such time as defendants file with and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for orderly withdrawal of Twin City from the New Jersey automobile insurance and property/casualty markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13 or until a contrary order is granted by the Final Judgment in this matter;

c. Defendants shall continue the renewal by Twin City, and those acting on Twin City's behalf, of private passenger automobile insurance and other lines of insurance in New Jersey until such time as defendants file with and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for the orderly withdrawal of Twin City from the New Jersey automobile insurance market, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13; or until a contrary order is granted by the Final Judgment in this matter;

d. Defendants shall not attempt, in any manner or form, to effectuate the withdrawal of Twin City from the private passenger automobile insurance and property/

casualty markets in New Jersey until such time as defendants file with and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for the orderly withdrawal of Twin City from those markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal, as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13; or until a contrary order is granted by the Final Judgment in this matter.

/s/ Hon. Paul G. Levy
Hon. Paul G. Levy, J.S.C.

N.J. Admin. Code §§ 11:2-29.1 *et seq.* (effective May 20, 1991).

SUBCHAPTER 29. ORDERLY WITHDRAWAL OF INSURANCE BUSINESS

Authority

N.J.S.A. 17:1-8.1, 17:1C-6(e), 17:17-10 and 17:33B-30 (P.L. 1990. c.8. sections 71 and 72 and 52:14B-1 et seq.)

Source and Effective Date

R. 1991 d.262, effective May 20, 1991.
See: 23 N.J.R. 15(b), 23 N.J.R. 1673(a).

11:2-29.1 Purpose and scope

(a) The purpose of this subchapter is to establish the requirements and procedures by which insurers may undertake an orderly withdrawal from the business of insurance in this State, thereby minimizing the adverse effects upon policyholders of eliminating coverage; preventing or minimizing the disruption in the marketplace and harm to the public that would otherwise occur in the absence of regulation; and permitting insurers to wind down their business in an orderly fashion as is consistent with N.J.S.A. 17:17-10 and 17:33B-30.

(b) This subchapter applies to all insurers that seek to withdraw from the business of insurance as defined herein.

11:2-29.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

"Affiliate" means an insurer that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the insurer that initiates a withdrawal, as defined in N.J.S.A. 17:27A-1.

"Annual statement" means the form of statement that is described in N.J.S.A. 17:23-1.

"Applicant" means the insurer seeking approval to withdraw from the business of insurance in this State.

"Assumption agreement" means a contract between insurers whereby one insurer transfers all or substantially all its rights, duties and obligations arising from certain policies to another insurer.

"Authority" means the power granted by the Commissioner which enables an insurer to transact the business of insurance.

"Automobile" and "automobile insurance" are as defined in N.J.S.A. 17:30E-3.

"Business of insurance" or "insurance" means any kind, line, subline, or a portion thereof authorized by Chapters 17 or 32 of Title 17 of the Revised Statutes.

"Commencement date" of withdrawal means the date which the applicant may begin withdrawing from this State pursuant to the approved plan of orderly withdrawal.

"Commissioner" means the Commissioner of the New Jersey Department of Insurance.

"Control" is as defined in N.J.S.A. 17:27A-1.

"Department" means the New Jersey Department of Insurance.

"Effective date" of withdrawal means the date at which the applicant has complied with any and all conditions contained in the approved plan of orderly withdrawal.

"Insurance holding company system" consists of two or more affiliated persons, one or more of which is an insurer as defined in N.J.S.A. 17:27A-1.

"Insurance producer" or "producer" means any person engaged in the business of an insurance agent, broker or consultant, as those terms are defined in N.J.S.A. 17:22A-2.

"Insurer" means an insurer or eligible surplus lines insurer, and any insurance affiliates thereof, authorized or admitted pursuant to Chapters 17 or 32 of Title 17 of the Revised Statutes to transact in this State the business of insurance as defined herein.

Multi-state account" means a single contract or policy of commercial lines insurance as defined in N.J.S.A. 17:29AA-3 which covers risks or locations in both New Jersey and at least one other state; any group policy in which covered members of the group reside in New Jersey and at least one other state; and any plan approved for the mass marketing of insurance pursuant to N.J.A.C. 11:2-12 in which policyholders of the plan reside in New Jersey and at least one other state.

"Plan" means a plan of orderly withdrawal from insurance business in New Jersey.

"Portfolio reinsurance agreement" means a contract between insurers whereby one insurer transfers its entire liability for in-force policies or outstanding losses, or both, to another insurer regarding a described segment of insurance business.

"Rating system" means every schedule, class, classification, rule, guide, standard, manual, table or rating plan by whatever name described containing the rates, rules and forms used by any insurer or by any rating organization in determining or ascertaining a rate.

"Reinsurance agreement" means a contract between insurers whereby one insurer agrees to insure part of all of an insurance risk of an originating, or ceding, insurer.

"Residual market mechanism" means any program authorized or created by the New Jersey State Legislature which is designed to provide an insurance market for insureds who are unable to obtain insurance in the voluntary market.

"State" means the State of New Jersey.

"Withdraw" or "withdrawal" means the nonrenewal, cancellation, or termination of policies, or surrender of authority to transact the business of insurance in this State, or any insurer action that is equivalent to a withdrawal from the business of insurance in this State which may include, but is not limited to, the elimination of a rating system, termination of agency contracts, reduction in agency commissions, restrictions on agency solicitation or binding authority, insurer refusal of applications or

declaration of a dividend to an affiliate, when such action or actions exceed those occurring in the ordinary course of business. Whether the above activities are equivalent to a withdrawal shall be determined by the Commissioner on a case-by-case basis.

"Withdraw" or "withdrawal" also means the transfer to another insurer of insurance business pursuant to an assumption agreement as defined herein or a portfolio reinsurance agreement as defined herein.

11:2-29.3 General provisions

(a) Any insurer that seeks to undertake any of the actions described as withdrawals in N.J.A.C. 11:2-29.2 shall provide the Commissioner with written notification so that he or she may determine whether the insurer must file a plan of orderly withdrawal pursuant to N.J.A.C. 11:2-29.4 or, if such plan is waived by the Commissioner under circumstances he or she considers appropriate, a reasonable substitute withdrawal procedure approved by the Commissioner.

(b) Any insurer that is required by the Commissioner to file a plan of orderly withdrawal pursuant to N.J.A.C. 11:2-29.4 shall submit to the Department an original and five copies of a proposed plan for prior approval thereof.

1. The Commissioner shall not begin his or her evaluation of the proposed plan until the applicant has complied with the requirements contained herein for its submission, including the submission of any additional information specifically required pursuant to N.J.A.C.

11:2-29.4(b), after which the Commissioner shall approve the plan within 120 days, subject to the terms and conditions which he or she may consider appropriate.

i. The Commissioner shall acknowledge to the applicant the receipt of any filing and request any additional information required for review pursuant to N.J.A.C. 11:2-29.4(b) within 30 days thereafter, the failure of which shall allow the applicant to treat the filing as complete.

ii. The Commissioner may extend the 120 day time frame for approval of the plan an additional 40 days for good cause and shall provide notice to the applicant of such extension.

2. An applicant shall not commence any action in furtherance of a withdrawal as defined herein prior to the Commissioner's approval thereof. For the purposes of this paragraph, commencing an action in furtherance of a withdrawal does not include the non-binding oral or written communication between an insurer/applicant and another insurer in negotiating a replacement of the insurer/applicant's insurance business by the other insurer, the negotiation of an agreement with a replacement carrier subject to approval of the Commissioner and conditioned on approval of the plan, or non-binding oral or written communications with any of the entities set forth at N.J.A.C. 11:2-29.4(a)11.

3. The authority of an applicant to conduct the business of insurance from which it seeks to withdraw, as well as any other authority which it is required to surrender pursuant to this subchapter shall, upon approval of

the plan, continue in effect, but only in accordance with the plan as approved.

4. No withdrawal shall become effective until the applicant has complied with any and all conditions contained in the approved plan which relate to the effective date of withdrawal.

5. Unless the applicant specifically requests and is granted a waiver, the applicant shall make either or both of the following special deposits, as a condition of approval of the plan, in securities or the equivalent thereof in performance bonds as determined by the Commissioner, until such time as the applicant's liabilities as determined by the Commissioner no longer exist in this State:

i. A deposit established with and in the name of the Commissioner for the benefit of all of the applicant's New Jersey policyholders, claimants and creditors which shall be equal to an amount not to exceed 125 percent of the applicant's current and potential liabilities existing or that may exist in this State;

ii. A deposit established with and in the name of the Commissioner pursuant to a consent order signed by the applicant to guarantee compliance with the approved plan, a material breach of which may, upon notice to the insurer, result in an immediate forfeiture of the deposit in whole or in part. This deposit shall be in an amount established at the discretion of the Commissioner and may equal the greater of one million dollars or 10 percent of the applicant's average annual net direct premiums written within the last three years in the line(s) from which it seeks to withdraw.

6. The applicant may substitute, with the approval of the Commissioner, in place of the deposits required in (b)5i above, the following:

i. A proper guarantee from its immediate or ultimate parent;

ii. A letter of credit;

iii. A trust agreement; or

iv. Any other financial guarantee of the applicant's total liabilities.

7. For good cause shown, the Commissioner may waive the special deposits or substitutes required in (b)5 and 6 above upon an consideration of factors including, but not limited to, the uniqueness of the applicant's circumstances, its size, and its volume of business and whether the withdrawal is being effected pursuant to an assumption or portfolio reinsurance agreement.

(c) The Commissioner may require as a condition of approval of the plan the surrender of some or all certificates of authority, issued pursuant to Chapters 17 or 32 of Title 17 of the Revised Statutes, held by the applicant or by other companies within the same insurance holding company system as the applicant for amendment, termination, suspension, restriction or such other modification as the Commissioner considers appropriate. Upon specific request by the applicant for a waiver of any portion of these requirements the Commissioner may grant the waiver in whole or in part if the Commissioner finds that, based upon proofs presented, one or more of the following mitigating circumstances exist:

1. The withdrawal will not cause a market availability problem or an undue disruption in the marketplace;

2. The applicant will enter into an agreement with a proposed replacement carrier to assume the applicant's existing book of business conditioned, however, upon an approved plan;

3. The withdrawal will not adversely affect competition;

4. The withdrawal is due to specified problems affecting the solvency of the applicant;

5. The withdrawal is consistent with the insurer's overall plan of withdrawal in other jurisdictions as part of a corporate restructuring; or

6. The public interest is best served by such a waiver.

(d) If more than one insurer within the same holding company system seeks or is required by the Commissioner pursuant to this subchapter to withdraw from the business of insurance in this State, each withdrawing affiliate shall submit a separate plan to the Commissioner pursuant to this subchapter or, if such plan is waived pursuant to (a) above, a reasonable substitute withdrawal procedure approved by the Commissioner.

(e) An insurer that currently services a residual market mechanism and is subject to the withdrawal provisions contained in the plan of operation governing such mechanism is exempted from the requirements of this subchapter to the extent of the insurance business serviced by the insurer in such mechanism.

(f) The applicant and its affiliates shall be prohibited for a period of up to five years after the effective date of withdrawal from acquiring, directly or indirectly, a controlling interest in any insurer that is licensed to do business in this State without approval of the Commissioner.

11:2-29.4 Elements of proposed plan of orderly withdrawal

(a) A proposed plan of orderly withdrawal shall contain the following information supported by adequate proof of the validity thereof, if not specifically required herein:

1. The reasons the applicant seeks to withdraw, supported by a description and documentation of the applicant's financial condition for the last three years or such other period as the Commissioner considers appropriate, including the underlying accounting, actuarial and other relevant data or material relied upon in deciding to seek withdrawal;

2. The proposed commencement date of such withdrawal;

3. A description of the following:

i. All authority currently and previously held by the applicant in all jurisdictions (specifically listing states in which the applicant has withdrawn);

ii. The authority in New Jersey currently and previously held by its insurer affiliates, including dates of issuance, surrender, suspension or revocation; and

iii. The authority in other jurisdictions held by the applicant or its insurer affiliates that has recently been surrendered or is intended for surrender currently and in the future;

4. An organizational chart and narrative description of the relationships among the applicant and its insurer affiliates, if any, indicating at a minimum:

i. The business of insurance which each has authority to write in New Jersey;

ii. The management relationships;

iii. The financial relationships (for example, reinsurance agreements, pooling arrangements, common investments, etc.);

iv. The marketing relationships;

v. The agency relationships;

vi. The claims handling relationships; and

vii. Whether any of the applicant's insurer affiliates are also taking action or applying to withdraw from the business of insurance in this State (and if so, the details thereof);

5. A description, by line of insurance written in New Jersey, of the applicant's and its insurer affiliates' business (both property/casualty and life, health) during the last three years, including for each year the corresponding premium volume, number of current policyholders, number of exposures, approximate market share and the number of insurance producers and employees servicing the business. If employees of the

applicant or any of its affiliates will be terminated in this State as a result of the applicant's withdrawal, a description of the method of termination, a description of the termination benefits and any other financial or nonfinancial accommodations made on the employees' behalf shall be included;

6. The address of each of the applicant's offices in this State;

7. Copies of the proposed cancellation and nonrenewal notices, and termination notices, the applicant intends to send to its policyholders and insurance producers, respectively, as well as any other withdrawal-related correspondence, including the proposed dates of such notices or correspondence. Producer termination notices shall comply with the requirements contained in N.J.S.A. 17:22-6.14a;

8. In the case of a proposed withdrawal of life, health or annuity business to be affected through one or more assumption agreements, the proposed certificate(s) of assumption and letters of notification (where appropriate) to policyholders informing them of the transfer of their policies to another insurer. In the case of a proposed withdrawal of other than life, health or annuity business to be effected through one or more portfolio reinsurance agreements, the reinsurance agreement(s) and letters of notification (where appropriate) to policyholders informing them of the reinsurance of their risks with another insurer;

9. The name and address of each insurance producer, as well as the number of policies sold and premium volume produced by each producer, by the line of

insurance, for a 12 month period prior to the filing of the proposed plan;

10. A specimen copy of each current producer contract;

11. Copies of all correspondence and notices to be sent to the following entities or their statutory successors, as well as a description of all agreements (which need not be in final form) reached with such entities or their statutory successors as to the applicant's financial and reporting obligations to them, as applicable; if not applicable, an explanation why. The following list is not intended to be exhaustive. It is the responsibility of the applicant to furnish the information required under this paragraph for any other statutorily created or authorized entity to which it owes or may owe a financial or reporting obligation. The Commissioner may require the applicant to deposit with any of the below-listed entities (or their statutory successors) an amount sufficient to meet the applicant's obligations thereto.

i. The Unsatisfied Claim and Judgment Fund established pursuant to N.J.S.A. 39:6-61 et seq.;

ii. The New Jersey Property-Liability Insurance Guaranty Association established pursuant to N.J.S.A. 17:30A-1 et seq.;

iii. The New Jersey Automobile Insurance Risk Exchange established pursuant to N.J.S.A. 39:6A-21 through 22.1;

iv. The Mutual Workers Compensation Security Fund establish[illegible] pursuant to N.J.S.A. 34:15-112;

v. The Stock Workers Compensation Security Fund established pursuant to N.J.S.A. 34:15-105;

vi. The New Jersey Insurance Division of Fraud Prevention established pursuant to N.J.S.A. 17:33A-1 et seq.;

vii. The Commercial Automobile Insurance Procedure established pursuant to N.J.S.A. 17:29D-1;

viii. The New Jersey State Division of Taxation for premium taxes required by N.J.S.A. 54:18A-1 et seq. and 17:33B-49;

ix. The Surplus Lines Guaranty Association established pursuant to N.J.S.A. 17:22-6.70 et seq.;

x. The Medical Malpractice Reinsurance Association established pursuant to N.J.S.A. 17:30D-1 et seq.;

xi. The Market Transition Facility established pursuant to N.J.S.A. 17:33B-11;

xii. The New Jersey Automobile Full Insurance Underwriting Association for examination assessments provided by N.J.S.A. 17:30E-18.1;

xiii. The New Jersey Automobile Full Insurance Underwriting Association for residual market equalization charges and policy constants established pursuant to N.J.S.A. 17:30E-8 and 17:29A-37.1, respectively; and

xiv. The Department of Insurance for examination fees provided for by N.J.S.A. 17:23-1 et seq. and other statutory fees provided for by N.J.S.A. 17:33-1;

12. A statement, by line of insurance written in this State, of all of the applicant's current incurred liabilities and reserves, including those incurred but not reported, as developed and certified by a "qualified actuary" as defined in N.J.A.C. 11:1-21.1 for property and casualty lines and by a Fellow of the Society of Actuaries for life and health lines, as of a date not earlier than 90 days prior to the submission of the proposed plan and which shall include the following in the case of insurance other than life:

i. Copies of all work papers of the actuary supporting the actuarial opinions;

ii. Copies of all underlying statistics used by the actuary;

iii. If not included in (b)12ii above, development triangles, New Jersey only and countrywide for the following. Triangles shall be constructed as of December 31 for as many accident years and as many development years as necessary to display at least five mature accident years. For the purpose of this requirement, a mature accident year is defined as one for which paid losses equal at least 99 percent of incurred losses including IBNR. Such data shall be supplied both in hard copy and as their ASCII equivalent. Any narrative necessary for proper interpretation of the data supplied shall be provided.

(1) Paid losses;

(2) Incurred losses; and

(3) Claim counts;

(A) Reported; and
(B) Close; and

iv. If the insurer does not have five mature accident years as required in (b)12iii above, then it shall display five accident years which are the closest to being mature, and if the insurer does not have five accident years of data, then it shall display the accident years it has.

13. A description of the manner in which the applicant has in the past three years handled and intends to handle claims, premium factor charges, premium billing, and policyholder service regarding policies held by New Jersey residents remaining in force after the plan has been approved. Provide a description of the applicant's staff and adjusters servicing these claims, including the servicing location and the procedures for consumer contact;

14. A list of all the applicant's and its affiliates' deposits, if any, currently held pursuant to N.J.S.A. 17:20-1 et seq.;

15. A description of the kind and amount of all reinsurance assumed and ceded by the applicant, identifying each ceding and assuming insurer and describing the corresponding risks in each reinsurance agreement. An explanation of whether the proposed withdrawal will affect the surplus of another insurer as a result of the loss of credit received by that insurer on any of the applicant's assumed reinsurance, as well as a description of the procedures designed to minimize any marketplace disruption or hazardous financial condition that may occur as a result of the loss of credit, shall be included;

16. A description of all multi-state accounts under which insurance has been provided for risks located in New Jersey, as well as an explanation of the impact of withdrawal on such risks;

17. The proposed amount of the special deposits required under N.J.A.C. 11:2-29.3(b)5, which shall be maintained until such time as the applicant's liabilities and potential liabilities no longer exist in this State;

18. Written certification from a duly authorized officer of the applicant, signed under the pains and penalties of perjury, that the information submitted in the proposed plan is accurate and complete to the best of his or her belief and that for as long as insurance policies are in force or there are unpaid losses or expenses in this State;

i. The applicant shall fully honor all of its legal obligations in this State;

ii. The applicant shall continue to service, without discrimination, all outstanding policies, bonds and surety obligations, which includes processing all usual and customary endorsements requested by insureds during the term of such policies, subject to the applicant's normal underwriting standards;

iii. The applicant shall continue to submit annual statements and information required by the entities set forth in (a)11 above, upon request, for as long as the applicant has any unearned premium or any unpaid or incurred losses in this State;

iv. The applicant shall continue to operate in accordance with the laws and regulations of this State and remain subject to examination by the Department for as long as considered necessary by the Commissioner;

v. The applicant shall not accept any new business whatsoever in this State unless authorized or required by the Commissioner, including reinsurance and excess or surplus lines placements; and

vi. The applicant shall maintain its designation of the Commissioner as its agent for service of process; and

19. The plan shall include a method acceptable to the Commissioner to verify the applicant's compliance with its obligations under the plan as approved which may include, but is not limited to, quarterly financial and informational reports of the applicant's progress under the plan.

(b) The Commissioner may require any other information he or she considers relevant to the evaluation of the request to withdraw.

11:2-29.5 Replacement; non-renewal

(a) Notwithstanding the provisions of N.J.A.C 11:3-8.3, if an applicant's request to withdraw involves private passenger automobile insurance and the applicant is required to submit a proposed plan, the applicant is subject to the following additional conditions which must be addressed in the proposed plan:

1. The applicant shall seek to place its business with a voluntary market replacement carrier or carriers

acceptable to the Commissioner for a specified period of years after the Commissioner's approval of the plan or until all automobile insurance is replaced, whichever is sooner.

i. The period of time in which an applicant must seek to place its business with a replacement carrier will be determined by the Commissioner, but in no instance will it be less than one year or more than five years. If, at the end of the designated period, the applicant has not succeeded in placing all of its private passenger automobile insurance policies with a vountary [sic] market carrier, the applicant shall begin an orderly process of nonrenewal at a rate designated by the Commissioner. In accordance with such process, the applicant shall provide two notices of nonrenewal to remaining policyholders. Unless the Commissioner finds that good cause exists for shortening the initial notice period, the first nonrenewal notice shall be provided at least one year prior to the next policy expiration date and its contents shall comply with the provisions of N.J.A.C. 11:3-8.3. The insurer shall issue a second notice of nonrenewal in compliance with the time and content requirements of N.J.A.C. 11:3-8.3.

ii. An insurer which acts as a replacement carrier for the private passenger automobile insurance business from which the applicant seeks to withdraw assumes all of the legal rights, duties and obligations associated with the participation of private passenger automobile insurers in the automobile insurance market in this State.

2. An applicant shall be required to accept the quotas established by N.J.S.A. 17:33B-11(c)5 unless the applicant specifically requests and the Commissioner agrees to a waiver of this requirement.

(b) If an applicant's request to withdraw involves other than private passenger automobile insurance, the applicant may be subject to conditions addressed either in the approved plan or, if the plan is waived pursuant to N.J.A.C. 11:2-29.3(a), in a reasonable substitute withdrawal procedure approved by the Commissioner.

11:2-29.6 Confidentiality of plan of orderly withdrawal

(a) All data or information contained in the plan is confidential and will not be disclosed by the Department to any person other than its employees and representatives, except the following items, but only upon written, specified request and upon notice to the insurer/applicant:

1. N.J.A.C. 11:2-29.4(a)3i – Description of current and prior authority to do business by jurisdiction;

2. N.J.A.C. 11:2-29.4(a)4 – Organizational chart;

3. N.J.A.C. 11:2-29.4(a)4i – Lines of insurance written by each affiliate;

4. N.J.A.C. 11:2-29.4(a)4v – Agency relationships of affiliates by agent name, to the extent available through the Department's licensing system;

5. N.J.A.C. 11:2-29.4(a)5 – Premium volume, number of current policyholders, market share and number of producers by line of business;

6. N.J.A.C. 11:2-29.4(a)6 – Address of applicant's offices in this State;

7. N.J.A.C. 11:2-29.4(a)7 – Policyholder nonrenewal and producer termination notices;

8. N.J.A.C. 11:2-29.4(a)9 – Name and address of each insurance producer to the extent available through the Department's licensing system;

9. N.J.A.C. 11:2-29.4(a)11 – Copies of all correspondence and notices sent to various entities, as approved, to which the applicant owes a financial obligation;

10. N.J.A.C. 11:2-29.4(a)12 – Certified statement of New Jersey incurred liabilities and reserves;

11. N.J.A.C. 11:2-29.4(a)14 – Deposits held by a custodian on behalf of the Commissioner; and

12. N.J.A.C. 11:2-29.4(a)17 – Establishment of special deposits or equivalent performance bonds as approved.

11:2-29.7 Fines and penalties

Failure to comply with this subchapter may result in the imposition of sanctions by the Department including, but not limited to, sanctions pursuant to N.J.S.A. 17:33-2.

11:2-29.8 Severability

If any provision of this subchapter or its application to any person or circumstance is held invalid, such determination shall not affect other provisions or applications

of this subchapter which can be given effect without the invalid provision or application, and to that end the provisions of this subchapter are separable.

Supreme Court, U.S.
FILED
DEC 21 1992

No. 92-728

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TWIN CITY FIRE INSURANCE CO., *et al.*,
Petitioners,
v.
SAMUEL F. FORTUNATO, COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF INSURANCE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF AMERICAN INSURANCE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Is the right to withdraw from a regulated market a protected liberty interest under the Due Process Clause as a safeguard against oppressive state regulation?

2. Does the unconstitutional conditions doctrine prohibit a state from conditioning the right to withdraw from an unprofitable business on forfeiture without compensation of valuable property interests in unrelated businesses?

3. Should the prohibition on protectionist state insurance taxes in *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), be applied to state insurance laws that protect local markets and discriminate against interstate commerce by imposing onerous penalties on an insurer's withdrawal from the state?

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On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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BRIEF OF AMERICAN INSURANCE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae American Insurance Association ("AIA") is a trade association whose member insurers write property and casualty insurance throughout the United States, amounting to approximately 25% of such insurance sold in this country.[1] Many AIA members also write property and casualty insurance in New Jersey, including approximately 19 percent of the auto insurance sold in that state.

In recent years, certain lines of insurance—particularly auto and workers' compensation—have become unprofitable in some states due to escalating claims costs, accompanied by the refusal of those states' regulators to permit rate increases sufficient to recoup those higher costs. As a result, many AIA members have withdrawn

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[1] Petitioners and respondent have consented to the filing of this brief. Copies of the parties' consent letters have been filed with the Clerk.

from these unprofitable lines and committed their capital to more efficient uses in insurance markets in other states.

The decision of the New Jersey Supreme Court in this case, however, sanctions application of a law to effectively prohibit AIA members from withdrawing from New Jersey's loss-ridden auto insurance market by threatening confiscation of the insurers' other property and casualty businesses in New Jersey if they leave. The lower court's decision thus deprives AIA's members of the freedom to relocate their businesses within interstate commerce and conscripts them into subsidizing local markets out of the pockets of their shareholders and customers in other states.

Due to the significant impact of the New Jersey law on its members, AIA participated as an *amicus curiae* in this case both before the Appellate Division of the New Jersey Superior Court and before the New Jersey Supreme Court.

REASONS FOR GRANTING THE WRIT

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents significant constitutional issues concerning a state's power to prevent businesses from withdrawing from regulated markets. Petitioners challenge New Jersey's revocation of their non-automobile insurance licenses as a coercive device to prevent them from withdrawing from the New Jersey automobile insurance market. The forfeiture of those non-auto licenses was not to protect New Jersey policyholders from the disruptive effect of sudden withdrawal from the auto insurance market; that legitimate regulatory interest was addressed by other regulatory measures, such as a transition period for withdrawal, which are not challenged here. Rather, the purpose of revoking petitioners' licenses, as expressed by the Insurance Commissioner and the court below, was to deter auto insurers from leaving the state *at all* and thus to compel them to assume unprecedented regulatory burdens.

In 1990, New Jersey fundamentally changed its regulation of the private passenger automobile insurance market by enacting the Fair Automobile Insurance Reform Act ("FAIR Act"). The new law took the radical step of, in effect, transforming private insurers into public utilities with a common carrier obligation to take on all customers, except those with the very worst driving records. The new act also imposed on insurers the obligation of paying off the massive deficit, exceeding $3 billion, incurred by the state-administered mechanism for underwriting automobile drivers unable to obtain coverage from private insurers.

To coerce insurers into asuming these onerous new regulatory burdens, § 72 of the FAIR Act authorized the Commissioner of Insurance to require any insurer withdrawing from the automobile market, and all of its affiliates, to forfeit their licenses to engage in any other type of property and casualty insurance business. *See* N.J. Stat. Ann. § 17:33B-30 (reprinted at Pet. App. A-57). This provision has widely been characterized as a "lock-in" law because the threat of losing profitable non-automobile insurance businesses effectively compels insurers to remain in the automobile market.

New Jersey's threat to confiscate an insurer's valuable property interests, to compel acquiescence in new regulatory burdens imposed in an entirely separate market, presents important constitutional issues:

1. "Lock-in" laws deprive a regulated business of its remedy of last resort against oppressive regulation—withdrawal from the regulated market. Exit barriers are thus a highly effective instrument of regulatory coercion designed to force businesses to submit to burdens that no company would shoulder voluntarily. In this case, for example, New Jersey has compelled insurers to capitulate to regulatory mandates substantially depriving them of their underwriting freedom and making them pay off deficits that the state had, only a few years before, statutorily

promised they would never have to assume. The decision of the New Jersey Supreme Court thus sends a signal to other states that they, too, can enact regulatory schemes requiring subsidization of local markets without fear that insurers will be able to depart the jurisdiction for states with more balanced regulatory environments.

In contrast to the decision of the New Jersey Supreme Court, the lower federal courts have regarded the right of market exit as so important a safeguard against restrictive regulation that the opportunity for withdrawal has frequently been cited in sustaining the constitutionality of regulatory laws, such as those in New Jersey, that severely restrict a company's return on investment. This Court should resolve this conflict between state and federal courts on whether regulated companies have a liberty interest in market exit protected under the Due Process Clause, especially in response to changes in the regulatory regime that upset a company's investment-backed expectations.

2. This case also presents a second significant question concerning the constitutional reach of a state's power to hold companies captive to a local market. That question is whether the constitutional conditions doctrine prohibits a state from threatening confiscation of one regulated business in order to prevent companies from leaving an entirely distinct market having no nexus whatsoever to the business being seized.

Acknowledging the fact that different lines of insurance are economically separate markets, New Jersey has always treated the automobile and non-automobile insurance businesses as unrelated ones for regulatory purposes. Entry into one market is not conditioned on entry into another, certificates of authorization to underwrite particular lines are separately issued, and rates are set separately for each market. The only legal or factual linkage between these different markets is the Commissioner's finding that the threatened seizure of profitable non-automobile insurance businesses will "encourage"

automobile insurers to remain in the state. Pet. App. A-87.

In effect, the Commissioner is using the fortuity of his power over a profitable unrelated business to advance regulatory interests that are wholly unconnected to the insurance licenses he has threatened to revoke. This Court has strongly suggested that such linkage is nothing but "an out-and-out plan of extortion." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987). *Nollan*, however, was decided in the context of a threatened confiscation of property that did not substantially advance the asserted state regulatory interest. Here, the threatened seizure of insurers' non-auto insurance businesses all too effectively advances New Jersey's illegitimate interest in holding auto insurers captive to the state. The Court should thus consider whether *Nollan* applies where a regulator attempts to advance state interests in one market by imposing a confiscatory condition on property held in an entirely separate business.

3. The petition should also be granted to resolve a conflict among the highest courts of three states over the constitutionality of insurance "lock-in" laws. The Massachusetts Supreme Judicial Court has upheld the constitutionality of a "lock-in" provision closely similar to the New Jersey statute. *See Maryland Casualty Co. v. Commissioner of Ins.*, 363 N.E.2d 1087 (Mass. 1977). However, a decision by the North Carolina Supreme Court struck down a "lock-in" law on the basis of the unconstitutional conditions doctrine and thus squarely conflicts with the decisions in Massachusetts and New Jersey. *See Hartford Accident & Indem. Co. v. Ingram*, 226 S.E.2d 498 (N.C. 1976).

4. A third significant question presented by the decision below is whether the states have a legitimate regulatory interest, under the Due Process Clause, in erecting market exit barriers intended to conscript insurers to serve local markets at the expense of out-of-state businesses and policyholders. "Lock-in" laws are inherently

protectionist. The New Jersey statute effectively prohibits multi-line insurers from transferring their capital, human and other resources committed to the New Jersey automobile insurance market to other insurance markets in interstate commerce. Further, because New Jersey's automobile insurance business has been unprofitable for many years, the effect of the New Jersey statute is to require out-of-state interests—insurer businesses in states other than New Jersey, and out-of-state policyholders—to subsidize the New Jersey market.

In *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), this Court determined that, notwithstanding the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, state insurance taxes intended to promote domestic insurance businesses, by discriminating against out-of-state businesses, serve no legitimate state interest under the Equal Protection Clause. This case should be reviewed to determine whether the prohibition against protectionist state taxation in *Metropolitan Life* should be applied to other types of protectionist insurance laws.

I. THE DECISION BELOW IS INCONSISTENT WITH FEDERAL COURT DECISIONS RECOGNIZING THAT THE RIGHT TO WITHDRAW FROM A MARKET IS AN ESSENTIAL SAFEGUARD AGAINST OPPRESSIVE REGULATION.

The takings and due process issues presented by this case warrant review because they implicate the ultimate constitutional safeguard against onerous state regulation —the right to get out of the regulated business.

New Jersey's Commissioner of Insurance forthrightly has said that the state's "lock-in" law is intended to coerce insurers into bearing the unprecedented regulatory burdens imposed by the FAIR Act, by threatening them with loss of their non-auto business if they seek to withdraw from the automobile insurance market. *See In re Fireman's Fund Ins. Co.*, Ins. Dept. No. 891-320 (Sept.

17, 1991) at 3 (requiring an insurer and its affiliates to forfeit all non-automobile property and casualty licenses in order to deter withdrawals and thus preserve the "comprehensive reforms wrought by the FAIR Act").

Because New Jersey's "lock-in" law has a manifestly coercive purpose, commentators have aptly described it as "a form of regulatory blackmail to prevent insurers from withdrawing from the auto insurance market." J.D. Cummins & M.A. Weiss, *Regulation and the Automobile Insurance Crisis*, Regulation, Spring 1992, at 52. "Most insurers are not auto insurance specialists but rather write various types of insurance," including commercial property and casualty coverages from which they derive "[a] high proportion of [their] revenues." *Id.* As a result, if New Jersey carries out its threat "to cancel the insurer's licenses to write all types of coverage in the state . . . the insurers would have to give up profitable commercial writings to leave the auto market." *Id.* Since "[m]ost insurers cannot afford to drop their commercial writings," they "are forced to absorb the losses imposed by restrictive auto insurance regulation." *Id.*

The FAIR Act is perhaps the most restrictive scheme of state automobile insurance regulation ever adopted, and has significantly increased the already substantial burdens borne by New Jersey insurers. Even before passage of the FAIR Act, New Jersey's auto insurance market was persistently unprofitable because regulators had artificially suppressed rate levels. As a New Jersey insurance official candidly explained, "New Jersey has used tight controls on auto rates to avoid paying the actual cost of the state's high accident rate and unbalanced no-fault system. As a result, the voluntary market has been unprofitable. . . ." Special Deputy Insurance Commissioner David N. Grubb, *Solving the Auto Insurance Crisis in New Jersey*, Apr. 10, 1989, at 3 (executive summary). Due to this rate suppression, the New Jersey Department of Insurance has found that "insurers

have lost money on private passenger auto in New Jersey in 10 out of 13 years. . . . In fact, over the 13-year period [from 1976 to 1989], operating losses on auto insurance have been more severe in New Jersey than in any other state." *Insurance Profitability Report*, The Insurance Reporter (N.J. Dept. of Insurance), Nov. 1989, at 2.

Passage of the FAIR Act in 1990 substantially amplified these regulatory burdens in the following respects:

—In 1983, New Jersey had created the New Jersey Automobile Full Insurance Underwriting Association (the "JUA") to provide coverage for automobile drivers otherwise unable to obtain it. All insurers were required to participate in the JUA and thus were jointly obligated to underwrite the state's riskiest drivers. However, the 1983 statute protected the JUA's member companies from incurring losses as a result of this state mandate. Insurers were exempted from liability for JUA deficits, which were made the state's responsibility. In addition, JUA rates, including surcharges on voluntary market policyholders, were required to be set at levels permitting the JUA to operate on a break-even basis. *See* N.J. Stat. Ann. §§ 17:30E-2, -7(b), -7(c), -8(a) (1983). In fact, however, rates were not set at adequate levels and, by 1990, the JUA had "accumulated a deficit of over $3.3 billion in unpaid claims and other losses." *State Farm v. State*, 590 A.2d 191, 196 (N.J. 1991).

In 1990, the FAIR Act repudiated the state's promise that insurers would not be liable for any JUA deficit. Insurers were required to pay for the bulk of JUA losses, through premium surtaxes and nonrepayable "loans" to a state fund. *See id.* at 196-97. New Jersey's Supreme Court rejected a facial constitutional challenge to these taxes and assessments as confiscatory, ruling that the Insurance Commissioner must afford carriers rate increases to recoup the added costs if they would deprive insurers of the opportunity to earn a fair return on

investment. *See id.* at 206-07. To date, however, the Insurance Commissioner has refused to permit any pass-through of these levies even though they have been imposed since 1990. *See, e.g., In re Private Passenger Automobile Rate Filings On Behalf Of State Farm Mutual Automobile Insurance Concerning FAIR Act Surtaxes and Assessments*, Ins. Dept. Order No. A92-319 (Nov. 17, 1992). The resulting losses can never be recovered because New Jersey's prospective ratemaking system permits recovery only of future estimated expenses, not past losses. *See Elizabethtown Water Co. v. New Jersey Bd. of Pub. Utils.*, 527 A.2d 354 (N.J. 1987).

—In 1988, New Jersey sought gradually to phase out the JUA through a statutory "depopulation" program by which policyholders were transferred from the "residual" market into the private or "voluntary" market. In 1990, to facilitate this transition, the FAIR Act created a Market Transition Facility ("MTF") for providing interim coverage to residual market risks prior to the completion of the depopulation program. *See* N.J. Stat. Ann. § 17:33B-11 (1990). As in the case of the predecessor JUA, MTF rates were to be calculated to permit break-even operation. *See In re Commissioner of Ins.*, 606 A.2d 851 (N.J. Super. Ct. App. Div. 1992), *cert granted*, 611 A.2d 653 (N.J. 1992). However, the Commissioner once again failed to set rates adequate to protect against losses, and as a result, the MTF accumulated a deficit in excess of $375 million in the first year of its existence. A New Jersey state court found that the Commissioner's refusal to operate the MTF on a no-loss basis violated the FAIR Act, *see id.*, but the Commisioner nevertheless has recently taken steps to assess the MTF deficit against insurers.

—The FAIR Act also substantially eliminated New Jersey's "voluntary" auto insurance market. Formerly, insurers could decline to underwrite drivers that did not meet individual company underwriting criteria. Now,

however, under the FAIR Act's "depopulation" program and so-called "take all comers" provision, insurers are obligated to accept all risks except drivers with the very worst record of traffic offenses.

Under the "depopulation" program, insurers must "voluntarily" underwrite JUA and MTF risks, or else those drivers will be assigned to them by the Commissioner. *See* N.J. Stat. Ann. § 17:30E-14. The "take all comers" provision then requires insurers to continue to accept former JUA and MTF risks, by forbidding insurers from turning down virtually any customer that approaches them. *See* N.J. Stat. Ann. § 17:33B-15. Once accepted, another statutory provision compels insurers to renew the policies of existing insureds, except on the basis of serious traffic offenses. *See* N.J. Stat. Ann. § 17:33B-25. In effect, New Jersey has converted private insurers into public utilities having a common carrier obligation.

The constitutionality of the above provisions is not presented for decision in this case. The issue, rather, is whether insurers have a right to leave a market in response to the imposition of such measures, especially when the measures fundamentally change the regulatory environment upon which companies relied in making their investments.

Regardles of whether these measures are constitutional, they undeniably impose novel and substantial burdens. The court below admitted as much by noting that the FAIR Act "unquestionably renders more burdensome and less profitable the private-passenger automobile-insurance business in New Jersey." Pet. App. A-19. Nevertheless, the lower court flatly ruled that petitioners were not denied substantive due process when New Jersey sought to prevent avoidance of "the remedial burdens imposed by the Act" by prohibiting withdrawal from the market. Pet. App. A-18.

This ruling conflicts with the reasoning of many lower federal court decisions which have addressed federal and

state regulatory laws that, like the FAIR Act, severely limit a company's opportunity to earn a fair return on investment. These decisions have implicitly viewed the right of withdrawal from the regulated market as an essential safeguard against regulatory overreaching. *See, e.g., Whitney v. Heckler*, 780 F.2d 963, 972 (11th Cir.) ("[G]overnment price regulation does not constitute a taking of property where the regulated group is not required to participate in the regulated industry."), *cert. denied*, 479 U.S. 813 (1986); *Minnesota Ass'n of Health Care Facilities v. Minnesota Dep't. of Pub. Welfare.*, 742 F.2d 442, 446 (8th Cir. 1984) (regulation of nursing home fees was not a "taking" because "nursing homes, unlike public utilities, have freedom to decide whether to remain in business and thus subject themselves voluntarily to the limits imposed by Minnesota on the return they obtain from investment of their assets"), *cert. denied*, 469 U.S. 1215 (1985); *MAPCO, Inc. v. Carter*, 573 F.2d 1268, 1282 (Temp. Emer. Ct. App.) (crude oil price controls were not unconstitutional because they did not "deprive the plaintiffs of the right to withdraw from the market"), *cert. denied*, 437 U.S. 904 (1978).

Here, New Jersey has eliminated this constitutional safety valve against onerous regulation. This case thus squarely presents a question on which the lower courts have been divided and which has not yet been addressed by this Court: Does the Due Process Clause afford insurers a liberty interest in withdrawing from a market when a state imposes new types of regulation that upset settled investment expectations?

II. THE DECISION BELOW SHOULD BE REVIEWED TO DETERMINE THE APPLICATION OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE TO LAWS DETERRING MARKET WITHDRAWAL BY THREATENING CONFISCATION OF PROPERTY INTERESTS IN AN UNRELATED BUSINESS.

This case also presents the question whether a state may seek to block such withdrawal through the imposition of an unconstitutional condition. This issue should be reviewed for two reasons: (1) to resolve the uncertainty over the application of this Court's decisions to a state's attempt to further its regulatory interests in one economically distinct market by threatening the seizure of valuable property in a separate market; and (2) to resolve conflicting decisions by the highest courts of Massachusetts, New Jersey, and North Carolina on the applicability of the unconstitutional conditions doctrine to insurance "lock-in" laws.

A. This Court Has Not Spoken Definitively on a State's Power to Condition Access to a Profitable Market on Participation in an Unrelated, Unprofitable Market.

This case implicates the unconstitutional conditions doctrine in two ways. First, because Twin City and its affiliates had a property right in their insurance licenses,[2] the Commissioner's license forfeiture order required petitioners to remain in the personal auto insurance market on pain of losing valuable property interests in other

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[2] The court below described the "property affected by the regulation [as] the value of the Twin City affiliates' New Jersey insurance business." Pet. App. at A-28. This description of the petitioners' property interests accurately describes New Jersey law, which regards the holder of a license as having a property right. *See Herz v. Degnan*, 648 F.2d 201, 208 (3d Cir. 1981), and cases cited in Pet. at 23. Hence, the state cannot constitutionally revoke insurance licenses for impermissible or purely arbitrary reasons.

markets. Second, if, as AIA believes, Twin City had a protected liberty interest in exiting the New Jersey auto insurance market, the Commissioner's order required petitioners to forfeit a due process right as a condition of retaining non-automobile insurance licenses. Either way, this Court's decisions indicate, without explicitly holding, that the conditions imposed by the Commissioner are constitutionally valid only if the interests being pursued by New Jersey in one insurance market are legitimately connected to the benefits conferred on insurers by the state-granted license or withdrawal right in the second insurance market.

Until passage of the 1990 "lock-in" law, New Jersey's regulatory regime recognized no such valid linkage between the benefits of engaging in non-automobile insurance businesses and the burdens associated with the auto insurance business, or vice versa. The state rightly treated these different lines of insurance as entirely separate businesses. The authorization to engage in one line was never conditioned on selling a separate line. There is no cross-subsidization between these different markets. Rates for each market are set separately, based on the costs associated with that market, and losses in one line of insurance cannot be offset through rate increases in a separate line. Thus, a company's departure from the automobile insurance market does not in any way burden other property and casualty markets and, conversely, an insurer's continuing participation in non-automobile insurance markets has no effect on the automobile market.

The only linkage between these markets cited by the court below and by the Commissioner is that threatening to seize profitable non-automobile insurance businesses will "encourage" insurers to remain in the unprofitable automobile insurance market. Pet. App. A-87. Hence, the requirement that petitioners forfeit their right to engage in non-auto insurance business is admittedly unrelated to furthering any state interest in those markets.

The Commissioner is simply using the happenstance of an insurer's profits in unrelated insurance markets as leverage for conscripting them into serving the personal automobile insurance market. Prior decisions of this Court strongly suggest that such coercive use of power over unrelated property interests is not constitutionally permissible.

For example, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court held that it was unconstitutional for a California state agency to condition the grant of a permit to build a house on beachfront property upon the landowner's grant of an easement for public access along the beachfront. The Court's direct holding was that the state's action violated the Takings and Due Process Clauses because the condition demanded (the granting of an easement along the beach on the *oceanfront* side of the house) did not in any way further California's asserted regulatory purpose (prevention of new construction that might block a view of the beach by persons on the *landward* side of the house). In this case, the Commissioner's threatened revocation of non-automobile insurance licenses substantially advances —all too effectively—New Jersey's illegitimate interest in preventing withdrawal of automobile insurers.

But *Nollan* was also premised on the idea that the property interests affected by the state-imposed condition must have some legitimate relationship to the regulatory interests being served. The opinion suggests that the easement condition imposed by California was unconstitutional not merely because it failed to advance the state's claimed interest, but also because the property interest affected by the condition (*i.e.*, the beachfront easement) had no connection to the property supposedly being regulated (*i.e.*, the house) and the state's interests in regulating housing construction. California was simply using its permit power as a coercive device to obtain an unrelated easement or, more bluntly, was engaged in "an out-and-out plan of extortion." 483 U.S. at 837 (citation omitted).

Here, too, New Jersey is using its power over non-automobile insurance licenses as a coercive device to effectuate regulatory interests have nothing whatsoever to do with the property which the state threatens to confiscate. The Commissioner's decision is therefore considerably more far-reaching than that before the Court in *California State Automobile Ass'n. Inter-Insurance Bureau v. Maloney*, 341 U.S. 105 (1951), where the Court upheld a California requirement that auto insurers underwrite certain undesirable auto insurance risks, on pain of losing their licenses *in the auto insurance market. See id.* at 108.

The Commissioner's decision does not equitably condition the benefits of engaging in one business on assuming regulatory burdens in that same business. Rather, to compel the assumption of burdens in the automobile insurance market, he is threatening to withhold a privilege conferring benefits in other markets that have no relationship to the burdens he seeks to impose. Indeed, the license forfeiture condition affects Twin City affiliates that are not in the auto insurance business at all. The Commissioner's action is scarcely different than threatening the petitioners that, if they withdraw from the unprofitable automobile insurance market, the state will seize the profitable hotel and manufacturing businesses owned by their parent company, the ITT Corporation.

The rationale of the *Nollan* decision strongly indicates that a state cannot threaten the seizure of an unrelated property interest to coerce compliance with a regulatory requirement having no nexus whatsoever with the property being confiscated. A writ of *certiorari* should be issued to clarify the applicability of *Nollan* and predecessor cases to attempts by state regulators to pursue state regulatory interests in one market by threatening confiscation of property interests in separately regulated markets.

B. State Supreme Courts Have Issued Conflicting Decisions on Whether a State May Permissibly Condition Withdrawal From One Insurance Market on Forfeiture of Licenses in Others.

Review of the decision below is especially needed because state courts have rendered inconsistent decisions on the constitutionality of lock-in laws generally and on the applicability of the unconstitutional conditions doctrine to such laws specifically.

The decision below is consistent with the earlier decision of the Massachusetts Supreme Judicial Court in *Maryland Casualty Co. v. Commissioner of Insurance*, 363 N.E.2d 1087 (Mass. 1977). That case involved a "lock-in" law closely similar to the New Jersey statute. If the Massachusetts Commissioner of Insurance determined that a withdrawing automobile insurer would "disrupt[] the market for said insurance . . . [and that such withdrawal] is not justified by the protection of solvency and is contrary to the public interest, he shall suspend such company's licenses to issue or sell any other form of insurance within the commonwealth." Mass. Gen. L. ch. 175, § 22H. The Massachusetts court, consistently with the New Jersey Supreme Court, rejected arguments that this license forfeiture condition was "confiscatory" and "a deprivation of liberty." 363 N.E.2d at 1099.

A North Carolina Supreme Court decision is directly to the contrary. In *Hartford Accident & Indemnity Co. v. Ingram*, 226 S.E.2d 498 (N.C. 1976), the court considered a statute conditioning an insurer's retention of its license to write general liability insurance on a requirement that it also underwrite medical malpractice insurance. Relying on the venerable line of unconstitutional conditions cases, the court ruled that the state could not, "as a condition precedent to the right of the plaintiffs to retain their licenses to engage in the business of insuring against liability for personal injury or property damage from other risks, require them to enter into the entirely separate and distinct business of insuring against liability for personal injury resulting from the practice of medicine." 226 S.E.2d at 507.

The New Jersey and Massachusetts decisions are also in conflict with a New York State decision. In *People ex rel. Lewis v. Safeco Insurance Co. of America*, 414 N.Y.S.2d 823 (1978), the New York Supreme Court held that the attempt of the Superintendent of Insurance to require two insurers to remain in the state violated due process: "Absent the most severe and grave public emergency, the State may not compel a corporation to conduct a business against its choosing." *Id.* at 830.

Unless this conflict is resolved, state legislators, regulators and insurers will face continuing uncertainty whether other states can follow New Jersey's lead and enact insurance "lock-in" laws.[3]

III. THE COURT SHOULD DETERMINE WHETHER STATE LAWS HOLDING INSURERS CAPTIVE TO LOCAL MARKETS SERVE AN ILLEGITIMATE PROTECTIONIST PURPOSE.

This case also presents the important question whether onerous penalties on withdrawal from state markets serve an illegitimate protectionist interest that violates the Due Process Clause.

The New Jersey Supreme Court forthrightly described the license forfeiture provision of the FAIR Act as having a protectionist purpose: "In such a period of regulatory turmoil and uncertainty, nothing short of severe regulatory measures imposed on private-passenger insurers threatening to withdraw—in other words, strong medicine —would be effective. If the forfeiture condition discourages withdrawal, a substantial State interest—retention of private-passenger insurers—will have been advanced." Pet. App. A-20. In effect, the lower court acknowledged that New Jersey was conscripting the capital of Twin

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[3] In the period since the enactment of the New Jersey FAIR Act, several state legislatures already have considered bills to create lock-in regimes akin to New Jersey's. *See, e.g.*, Maine S. 228 (1991); Maryland S. 698 (1991); Rhode Island H. 8333 (1992); Rhode Island H. 7519 (1992); Vermont H. 130 (1991).

City to serve the interests of local policyholders by depriving the company of its freedom to move its resources elsewhere in interstate commerce.

Indeed, New Jersey's "lock-in" law discriminates against interstate commerce in three respects. First, it requires "business operations to be performed in the home State that could more efficiently be performed elsewhere." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970). Like laws requiring a business to locate its operations within a particular state, "lock-in" laws "impose . . . a straitjacket on [a] company with respect to the allocation of its interstate resources." *Id.* at 146.

Second, since the New Jersey automobile insurance market is unprofitable, the "lock-in" law requires insurers to subsidize a local market out of the pockets either of its customers in other states or its shareholders. Because New Jersey prohibits its insurers from raising their rates in non-automobile insurance markets to recover automobile insurance losses, New Jersey insureds in non-automobile insurance markets do not bear any part of the burden of automobile market losses. Multi-state insurers operating in New Jersey must either pass those losses through to their shareholders, in the form of reduced earnings and dividends, or to their policyholders in other states.

Third, as even the lower court seemed to concede, a "lock-in" law eliminates "competition among state governments [that] tends to prevent overregulation, [by] offering companies choices in determining those States' regulatory systems to which it will subject its business operations." Pet. App. A-28.

Because of this discrimination against interstate commerce, in any other industry, the Commerce Clause would prohibit lock-in laws. Laws requiring a business to remain in-state are "virtually *per se* illegal," even "where the State is pursuing a clearly legitimate local interest." *Pike v. Bruce Church, Inc.*, 397 U.S. at 145; *see also*

South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984); *Toomer v. Witsell*, 334 U.S. 385, 403-06 (1948); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928).

Even though the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, "removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance," *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653 (1981), state laws creating obstacles to the free flow of interstate commerce may still be invalid under other constitutional provisions if they have a protectionist purpose. This is particularly true when, as here, a state attempts to effectuate its protectionist intent by "impos[ing] *unconstitutional* conditions on the grant of [the] privilege" of doing business in that state. *Id.* at 657-58 (emphasis in original).

In *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), the Court struck down an Alabama insurance tax law under the Equal Protection Clause because it had an illegitimate protectionist goal. The Court concluded that a purpose to promote the interests of domestic insurance companies was illegitimate when the goal was not to advance "the *interstate* business" of those local companies but, rather, "to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there." *Id.* at 877, 878 (emphasis in original).

While the Commerce Clause may not apply in this context, New Jersey's protectionist action here, like the Alabama statute struck down in *Metropolitan Life*, violates a separate constitutional provision (the Due Process Clause) that clearly does apply in the insurance context. New Jersey's "lock-in" law is the mirror image of the statute struck down in *Metropolitan Life*. Rather than "erect[ing] barriers to foreign companies who wish to do

interstate business" within the state, *id.* at 878, New Jersey is erecting barriers to companies doing business within New Jersey who wish to do additional business outside the state by preventing them from reallocating their resources beyond the state's borders. The fact that New Jersey has created a market exit barrier rather than an entry barrier is thus immaterial because, in both cases, the purpose is to protect a local market by creating obstacles to the free flow of interstate commerce. Like Alabama's objective, New Jersey's aim is "to favor domestic [policyholders] within the State, no matter what the cost to foreign [policyholders.]" 470 U.S. at 878.

The state court decision below should thus be reviewed because, like the decision of the Alabama Supreme Court scrutinized in *Metropolitan Life*, it presents an important question concerning whether protectionist state insurance laws serve a constitutionally permissible state interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 92-728

In The
Supreme Court of the United States
October Term, 1992

TWIN CITY FIRE INSURANCE CO., ET AL.,
Petitioners,

v.

SAMUEL F. FORTUNATO, COMMISSIONER
OF THE NEW JERSEY DEPARTMENT OF INSURANCE,
Respondent.

Petition For Writ of Certiorari To The Supreme Court of New Jersey

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* CONNECTICUT BUSINESS & INDUSTRY ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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December 24, 1992

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

The Connecticut Business and Industry Association ("CBIA") requests leave to file the appended amicus brief in support of the petition for a writ of certiorari filed in this case. CBIA is a business association whose members reflect a broad cross section of businesses in Connecticut, the state with the highest concentration of insurance underwriters in the nation and so the state perhaps most affected by New Jersey's actions at issue.

CBIA is the largest business organization in Connecticut, having approximately 7,000 members that employ a total work force of over 700,000 employees. CBIA presents the views of its members on public policy and legal issues to legislative and judicial authorities.

Approximately eighteen of CBIA's members are insurance underwriters. Most of these firms do business in multiple states and so have a particularized and well-founded concern that the decision below may create a precedent inimical to their constitutional rights and their ability to structure their interstate operations most effectively. More generally, many of CBIA's members engage in interstate commerce and are concerned that the decision below may set a precedent encouraging other state laws which could be used to hold firms captive in states which they wish to leave for rational economic reasons.

CBIA believes its brief may offer the Court a disinterested analysis of the general significance of the issues raised by the petition which may assist the Court in ruling on the petition.

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INTEREST OF AMICUS

The Connecticut Business and Industry Association ("CBIA") is the largest business organization in Connecticut, having approximately 7,000 members employing a total work force of over 700,000 employees. CBIA's members reflect a broad cross section of businesses in Connecticut, the state with the highest concentration of insurance underwriters in the nation. CBIA presents the views of its members on public policy and legal issues to legislative and judicial authorities.

Approximately eighteen of CBIA's members are insurance underwriters. Most of these firms do business in multiple states and have a particularized concern that the decision below may create a precedent inimical to their constitutional rights and ability to structure their interstate operations most effectively. More generally, many CBIA members engage in interstate commerce and are concerned that the decision below may encourage other state laws which could be used to hold firms captive in states which they wish to leave for rational economic reasons.

CBIA is also concerned about this case because it reflects a growing trend for states to deal with crises in one area of insurance by putting burdens on companies doing other lines of business. As noted in the Petition and in AIA's amicus brief, California, New York, Iowa, Massachusetts and Maine have tried or are considering conscripting insurers into remaining in the state or cross-subsidizing specific lines of business. Pet. at 9, n.8; 10, n.9. CBIA believes that the Petition here should be granted so its members and the community at large may obtain a definitive resolution of the legality of such efforts.

Pursuant to Supreme Court Rule 37.2, CBIA has obtained consent for the filing of this amicus brief from counsel for the petitioners. Counsel for the respondent has not consented, so a motion for leave to file this brief has been filed herewith.

STATEMENT OF THE CASE

CBIA accepts and relies upon the statement of the case contained in the Petition. Pet. 3-8.

SUMMARY OF ARGUMENT

The single issue presented by this case is whether a state can force an insurance company to continue to write a certain line of business against its will by threatening to revoke other insurance licenses owned by that company and by affiliated companies. Petitioner has analyzed this issue in terms of New Jersey's exercise of control over the company's "fundamental due process right to exit from an undeniable regulatory system." Pet. at 9. As an amicus, CBIA suggests that the impropriety of New Jersey's actions can also be seen by focussing on the other side of the equation, the constitutional invalidity of state's threat to other business licenses owned by Petitioner and its affiliates.

The threat to those other licenses can be analyzed in either of two ways. First, revocation of a business license because of an issue arising in an unrelated business is a denial of substantive due process. See infra, 3-7. Second, carrying through that threat and actually revoking those valuable licenses would be a "categorical" taking of property without compensation. See, infra 7-9.

The right to cease doing business is the ultimate response to unsatisfactory business conditions. As the Petition here notes, it is analogous to the constitutional right of individuals to travel from state to state. Pet. at 15. In this case, the automobile insurance market in New Jersey has virtually collapsed due to the state's misguided regulatory policies. New Jersey's effort to coerce Twin City and other insurers into foregoing their ultimate response and remaining in the state against their judgment of economic rationality has led the state into violating two different constitutional protections against arbitrary state power.

ARGUMENT: REASONS FOR GRANTING THE WRIT

I. NEW JERSEY CANNOT CONSTITUTIONALLY CONDITION OR THREATEN PETITIONERS' NON-AUTO LICENSES TO ACHIEVE AN END UNRELATED TO THE REASONS FOR WHICH THOSE LICENSES ARE REGULATED.

As the Petition makes clear, this case is about one thing only. The New Jersey automobile insurance market is a shambles and automobile insurers are eager to escape from an increasingly unprofitable situation. Only by prescribing "severe regulatory measures . . . in other words, strong medicine . . . ," Pet. A-20, will the state be able to keep a viable private automobile insurance market alive. In this case that "strong medicine" is the equivalent of hostage taking. In effect, New Jersey has said that unless Twin City consents to continue writing automobile insurance in the state under the onerous conditions specified by the euphemistically named FAIR Act, N.J. L. 1990, c. 8, it and all other affiliated insurance carriers must forfeit within five years all of their licenses to engage in non-automobile property and casualty insurance in the state (the "non-auto licenses"). Pet. A-7.[1]

This New Jersey cannot constitutionally do. While the Insurance Commissioner has broad power to regulate the business of insurance and to impose restrictions on the Twin City's non-auto licenses or even, if statutory conditions and procedures are met, to revoke those licenses, that licensing power does not permit the Commissioner to automatically impose whatever burdens he deems fit to remedy a given situation.

The state cannot condition Twin City's and its affiliates' non-

---

[1] The "non-auto licenses" do include auto insurance licenses held by affiliated companies which cumulatively amount to a substantial fraction of the auto insurance business currently handled by Twin City. Pet. at 5, n.4.

auto licenses on their acquiescence with an unconstitutional condition. As Justice Scalia noted in Nollan v. California Coastal Commission, 483 U.S. 825, 837 (1987), even when the state is exercising its core function of protecting public safety, if it attempts to add an unrelated condition, such as a compelled forfeiture of property rights, it oversteps constitutional bounds.

Nollan involved California's attempt to leverage its right to deny a building permit into acquisition of an easement across private property. Justice Scalia conceded, for purposes of argument, that California could have denied the Nollans the permit they sought because the rebuilt house would block the public's view of the ocean and it could have conditioned the permit to protect the public's ability to see the beach by limiting the house's height. Id. at 835-36. But California failed "utterly" to show that the condition it did impose, a lateral easement across the land, would "further the end advanced as the justification for the prohibition." Id. at 837. What was required was a showing that the condition imposed "substantially advance[d]" the state interest relied on to justify the state's power. Id. at 834.

> "The lack of nexus between the condition and the original purpose of the [regulation] converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid public purpose, but without payment of compensation. [That is] 'an out-and-out plan of extortion.'"

Id. at 837.

Plainly the non-auto licenses to engage in the business of selling property and casualty insurance held by Twin City and its affiliates are property rights for constitutional purposes. See, e.g., Jordan v. United Insurance Company, 289 F. 2d 778, 781 (D.C. Cir. 1961); United American Ins. Co. v. Whaland, 337 A. 2d 358, 360 (N.H. 1975); Herz v. Degnan, 648 F. 2d 207, 208 (3rd. Cir.

1981). Furthermore, no extended discussion is required to show that revoking the non-auto licenses does not "substantially advance," indeed is totally unrelated to, the state's legitimate interest in regulating how Twin City and its affiliates use those licenses to engage in the property and casualty businesses. Revocation of those licenses would not benefit Twin City's policyholders or strengthen its ability to serve the public. Rather it would simply punish Twin City and its affiliates, and ultimately their shareholders and policyholders, for refusing to subsidize New Jersey's automobile insurance market.[2]

Paying money to meet the $ 3.3 billion accrued deficit of the New Jersey JUA, see Pet. A.-13, may be a valid government purpose, but it has no rational connection with the regulatory governmental purposes that justify the state's licensing of Twin City and its affiliates to underwrite their non-auto insurance.

That total "lack of nexus" between the state's interest in regulating Twin City's non-auto business activities and its interest in seeing that the JUA's debts are paid makes it unconstitutional for New Jersey to condition the non-auto licenses on continuation of Twin City's auto business in the state.[3] Nollan, supra. See also

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[2] The New Jersey Supreme Court candidly noted that if Twin City does flee the state, the forfeiture condition will open up an opportunity for other companies to acquire the non-auto business it and its affiliates must forego. Pet. A. 20. The court concluded that the lure of that prospect might make other insurers more willing to remain in or enter the state's auto market. Id.

[3] It might also be noted that, even on its own terms, New Jersey cannot show a rational connection between the perceived problem and its proposed solution. The purported "purpose" here was to prevent "market instability" upon Twin City's withdrawal. Pet. A-14. But the condition New Jersey imposed, forfeiture of all licenses owned by Twin City and its affiliates, including licenses to write auto insurance aggregating to a substantial fraction

(continued...)

CalFarms Insurance Co. v. Deukmejian, 771 P. 2d 1247, 1253-54 (Cal. 1989)(states cannot constitutionally force companies to use profits earned in prior years to support future confiscatory rates).[4]

By making the non-auto licenses hostage to Twin City's remaining in the New Jersey auto market, the state has forced Twin City and its affiliates to remain or enter into a business they have chosen not to undertake. As amicus AIA notes in its brief, this case presents a situation similar to that considered in Hartford Acc. & Indem. Co. v. Ingram, 226 S.E. 2d 498 (N.C. 1976). In Ingram North Carolina dealt with a crisis in the medical malpractice market by ordering all companies writing general liability insurance in the state to offer medical malpractice insurance. The North Carolina court held that law violated due process because it required companies to engage in an "entirely separate and distinct business" as a condition to their right to carry on entirely different businesses for which they were duly licensed and which they wanted to engage in. Id. at 507; see also Frost Trucking Co. v. Railroad Commission, 271 U.S. 583 (1926); Appleman, Insurance Law, §10413 at 297 (1982)(". . . it has been held that [the Insurance Commissioner] may not mandate that [a company] write a class of business it chooses not to undertake.")

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[3](...continued)
of Twin City's own share of the New Jersey market, Pet. at 5, n.4, would worsen rather than prevent instability. Since there is no rational nexus between the forfeiture of the non-auto licenses and the alleged market instability, forfeiture is a denial of substantive due process.

[4] CalFarms also rebuts any claim by the respondent that the Commissioner's action is not unconstitutional because it has not, by itself, forced Twin City into insolvency. A statutory proviso allowing those insurers that face insolvency to escape the impact of a state regulation that causes financial harm is not sufficient to save an otherwise unconstitutional measure. See id., 771 P. 2d at 1253-54.

In the end what New Jersey has done comes down to a ruthless attempt to exercise whatever coercive power the state has in order to force companies to sell auto insurance on the terms the state prescribes. Threatening Twin City's affiliates' non-auto licenses is not qualitatively different than having the Registry of Motor Vehicles announce that it will revoke the drivers licenses of all Twin City employees unless the company bends to the state's will.

New Jersey's power over insurers which it licenses is limited to regulating the conduct of the businesses for which they are licensed; it is not the untrammelled royal prerogative which the Stuart kings, to their ultimate cost, sought to exercise over their unwilling subjects.

CBIA respectfully suggests that granting the petition in this case would offer the Court an opportunity to clarify that Nollan teaches that the exercise of state power is limited to achieving the "same governmental purpose" for which that power was granted. Id. at 837.

II. REVOCATION OF THE NON-AUTO LICENSES WOULD BE AN UNCONSTITUTIONAL TAKING OF PROPERTY WITHOUT COMPENSATION.

The Constitution prohibits a state from taking private property without payment of just compensation. U.S. Const. amend. V.[5] If New Jersey carries through its threat to revoke the non-auto licenses when Twin City leaves the state's auto market, it would be taking valuable property rights for which it will pay Twin City and its affiliates no compensation at all. As the court below conceded, the forfeited business is potentially attractive to other insurers and

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[5] The Takings Clause is applicable to the states by operation of the due process clause of the Fourteenth Amendment. See, e.g., Penn Central Transportation Co. v. New York City, 438 U.S. 104, 122 (1978).

forfeiture would cause a "significant economic loss" to Twin City and its affiliates. Pet. A-20, 28.

The Fifth Amendment was specifically designed to bar the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne only by the public as a whole." Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163 (1980)[6]; see also, Yee v. Escondido, __ U.S. __, 118 L. Ed. 2d 153, 162 (1992)(Takings Clause requires compensation when a "regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.")

The Takings Clause bars the government from exacting a forced contribution to general government revenues which is not reasonably related to the costs of any service it is providing. Id. "That Clause stands as a shield against the arbitrary use of governmental power," Webb's Fabulous Pharmacies, 449 U.S. supra at 164, exactly the situation presented by New Jersey's effort to expropriate the value of the non-auto licenses and use it as a lure to encourage other insurers to sell auto insurance in the state. Pet. A-20.

While the court below was coy on the extent of the loss Twin City and its affiliates would suffer if they must forfeit the non-auto licenses, Pet. A-28, it is clear that as a matter of law, without those licenses, Twin City and its affiliates would be legally barred from engaging in the specific businesses covered by each forfeited license in the state of New Jersey. As discussed above, New Jersey law recognizes that a business license is a property right because it allows a person or business the valuable right to engage in business. Conversely, therefore, it is clear that a revoked license loses all economic value. Thus, as to each forfeited non-auto

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[6] Beckwith involved the state's effort to appropriate the interest that accrued on funds held by a court clerk in an interpleader action.

license held by Twin City and its affiliates, New Jersey has threatened to take the entire economic value of the license to its holder.

This case thus falls squarely within the logic of the Court's decision earlier this year in Lucas v. South Carolina Coastal Commission, __ U.S. __, 120 L. Ed 2d. 798, 813-15 (1992) which announced the "categorical" rule that compensation must be provided without further specific inquiry where the state has taken an entire property interest. The New Jersey Supreme Court's only response to the applicability of the "categorical" rule to this case was to distinguish Lucas as a "decision . . . involving real property . . . ." Pet. A-28.

That court was, of course, quite correct to note that Lucas did involve state regulation of real property. See, e.g. id., 120 L. Ed. 2d. at 815 ("when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good . . . he has suffered a taking.")(emphasis in original). But the takings clause of the Fifth Amendment does not on its face distinguish between real property and the many other kinds of property which this Court has recognized are entitled to constitutional protection.

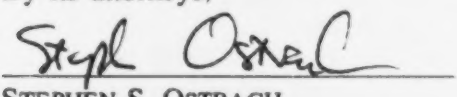
CBIA respectfully urges this Court grant the petition here to clarify whether Lucas is narrowly limited to interests in land or whether, as it logically should, it announces a constitutional rule that protects all forms of property from arbitrary state confiscation.

CONCLUSION

For the reasons set forth above, CBIA respectfully requests that this Court grant the petition for a writ of certiorari and reverse the decision of the New Jersey Supreme Court.

DATED: Boston, Massachusetts: December 24, 1992.

Respectfully submitted,
CONNECTICUT BUSINESS &
INDUSTRY ASSOCIATION
By its attorneys,



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MOTION FILED

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No. 92-728

In The

Supreme Court of the United States

October Term, 1992

TWIN CITY FIRE INSURANCE CO., *et al.*,

Petitioners,

v.

SAMUEL F. FORTUNATO, COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF INSURANCE,

Respondent.

On Petition For A
Writ Of Certiorari To The
Supreme Court Of New Jersey

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF INSTITUTE FOR JUSTICE, CITIZENS FOR A SOUND ECONOMY, COMPETITIVE ENTERPRISE INSTITUTE, HEARTLAND INSTITUTE, AND PIONEER INSTITUTE IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION FOR LEAVE TO FILE ATTACHED BRIEF AMICI CURIAE

The Institute for Justice, Citizens for a Sound Economy, the Competitive Enterprise Institute, the Heartland Institute, and the Pioneer Institute move for leave to file the attached brief *amici curiae* in support of the petition in this case. Petitioners consented to the filing of this brief. Respondents refused to consent without reviewing the contents of the brief in advance, a condition which *amici* declined to accept, making this motion necessary.

Each of the *amici* is a nonprofit organization that conducts some combination of research, public education, legislative advocacy, and litigation in support of a common ideal: the protection and preservation of a free market economy and a republican form of government. None of the *amici* is affiliated, directly or indirectly, with the insurance industry (or any other economic interest group). The Institute for Justice is a nonprofit, public interest legal foundation dedicated to securing full constitutional protection for economic liberty, private property rights, and freedom of speech. Citizens for a Sound Economy is a 250,000-member, nonpartisan, nonprofit citizen advocacy group that promotes market-based solutions to public policy problems to achieve economic freedom and opportunity for all people. The Competitive Enterprise Institute is a nonprofit organization dedicated to advancing public understanding of the hidden costs of government over-regulation. The Heartland Institute serves the nation's 8,000 governors, state legislators, and state constitutional officers by providing them with objective research on state and local public policy issues. The

Pioneer Institute for Public Policy Research is a Massachusetts based tax-exempt organization that is supportive of market-based alternatives to many governmental initiatives and programs in Massachusetts.

By filing this brief, *amici* wish to emphasize that the issue in this case is not merely the problem of one company, or even of one industry, but is of widespread importance to our economic system and the structure of legal rights. We believe that the right of exit at issue in this case is preservative of every other right – and especially of the rights of shareholders and customers in other states, who have no voice or vote in New Jersey, but who are the targets of this oppressive legislation. They have no way to protect themselves from oppressive measures except to leave. We wish to bring this broader perspective to bear on this Court's consideration of the case. Accordingly, we seek leave to file this brief *amici curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Whether the United States Constitution protects the right of an individual or corporation to refuse to do business within a state.

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UNIVERSAL DECLARATION OF HUMAN RIGHTS, Art. 13. 11

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BRIEF OF INSTITUTE FOR JUSTICE, CITIZENS FOR A SOUND ECONOMY, COMPETITIVE ENTERPRISE INSTITUTE, HEARTLAND INSTITUTE, AND PIONEER INSTITUTE IN SUPPORT OF THE PETITION FOR CERTIORARI

INTERESTS OF AMICI CURIAE

The interests of the *amici* are set forth in the motion for leave to file a brief *amici curiae*

STATEMENT OF THE CASE

This case arises out of an attempt by the State of New Jersey to prevent certain private businesses from leaving the state, so it can force them to bear the costs of the legislature's regulatory mistakes. In 1983, the legislature

passed the "Automobile Full Insurance Availability Act," the provisions and results of which are described by the state Supreme Court at Pet. App. A8-A10. The essential premise of the legislation was that high risk drivers should be provided insurance at rates equivalent to lower risk drivers, notwithstanding their higher costs. This was accomplished through establishment of the Joint Underwriting Association (JUA), a governmental entity that provided insurance to high risk drivers. The JUA was administered by the private auto insurance carriers of the State, which were assured that they "were to be insulated" from any "claims and liabilities" that might arise from the operations of the JUA. Pet. App. A9.

Since the premiums charged to high risk drivers would be inadequate (because they were charged no more than lower risk drivers), the "Reform Act" subsidized the JUA through revenue from traffic violations and drunk driving convictions and from surcharges on ordinary auto insurance policies. Pet. App. A9. Even these sources of revenue proved insufficient, and more and more drivers were attracted into the JUA. By 1988, over half of all New Jersey drivers were covered by the JUA, and the supplemental revenues lagged far behind the cost of providing subsidized insurance. Pet. App. A10. By 1990 the JUA had amassed a deficit of over $3.3 billion in unpaid claims and other losses.

The legislature then attempted retroactively to shift a large portion of this multi-billion dollar deficit onto the insurance companies. In the so-called "Reform Act" of 1990, the legislature imposed assessments totalling $160 million per year on property-casualty insurers and an additional 5% surtax on personal auto insurance premiums, anticipated to raise $300 million per year. Pet. App. A11-A12. Significantly, the insurance carriers were forbidden to pass on the cost of either the assessment or the surtax to their customers; these payments were to be

borne by the shareholders, most of whom are out-of-staters.

The "Reform Act" also retroactively restricted the right of insurance companies to withdraw from the New Jersey market, which is the issue in this case. Under prior law, insurance companies had a protected right to cease to do business in the State, provided they surrendered their license. *Sheeran v. Nationwide Mutual Ins. Co.*, 404 A.2d 625, 630 (N.J. 1979). Section 72 of the "Reform Act," however, forbade surrender of a license without advance permission from respondent.

While the proposed "Reform Act" was under consideration by the legislature, officials at petitioner, Twin City Fire Insurance Company, calculated that it would sustain underwriting losses of more than $46 million over the ensuing three years if the Act passed. Pet. App. A6. It therefore decided to withdraw entirely from the business of automobile insurance in the State, and surrendered its license on March 7, 1990. Five days later, the "Reform Act" was signed into law. Pursuant to the retroactive authority of Section 72, respondent sought and obtained an injunction requiring the company to rescind its notices of withdrawal and to submit a "plan for orderly withdrawal" in conformity with the new Act.

Twin City proposed a plan of withdrawal, under which it would withdraw from the market over a one-year period by nonrenewal of policies, would guarantee existing liabilities, and would submit to regulatory oversight in the interim period. Pet. App. A68. Respondent, however, imposed some 14 additional "conditions," including conditions that effectively precluded withdrawal. The most significant of these conditions were

- *The five year condition*. Respondent required Twin City to continue to provide insurance for all of its policyholders for five years (unless it could place the business with other insurers, which is not a viable possibility).

- *The new business condition.* During this five year period, respondent required Twin City to take on additional business. The losses during this five year period are projected to total approximately $100 million.
- *The other business condition.* At the end of the five year period, Twin City must forfeit its licenses to issue other lines of insurance in the State of New Jersey. This business totalled more than $37 million in 1991. Business licenses are recognized as property under New Jersey law.[1]
- *The forfeiture condition.* At the end of five years, the seven other separately incorporated insurance companies owned by Twin City's parent corporation, ITT Hartford, must forfeit all their insurance licenses in the State of New Jersey. This business totalled more than $125 million in 1991.

Pet. App. A6-A7.

Twin City challenged respondent's order in state court, claiming – among other legal arguments – that the decision violated its federal constitutional rights under the Takings Clause and the Due Process Clause by putting it to the choice of either forfeiting its constitutionally protected liberty of ceasing to do business in the State or suffering a taking of its property without just compensation.

The state Supreme Court upheld respondent's order. The court rejected petitioner's substantive due process argument, finding that the requirement to continue in business for five years against its will "is hardly an onerous one" (Pet. App. A17) and that the requirement to

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[1] *New Jersey Department of Environmental Protection v. Atlantic States Cast Iron Pipe Co.*, 575 A.2d 457, 462 (N.J. Super. App. Div. 1990); *De Vitis v. New Jersey Racing Comm'n*, 495 A.2d 457, 462 (N.J. Super. App. Div.), *cert. denied*, 508 A.2d 213 (N.J. 1985).

take on additional business "is not only rational and fair but virtually required by the Act." *Id.* at A18. The court reasoned that to permit "an insurer who enjoyed profitable operations during the pre-Reform Act period" to "abandon entirely the remedial burdens imposed by the Act on all private-passenger insurers" would be "inequitable." *Id.* The court upheld the license forfeiture provisions expressly on the ground that this would "discourage[] withdrawal":

> In such a period of regulatory turmoil and uncertainty, nothing short of severe regulatory measures imposed on private-passenger insurers threatening to withdraw – in other words, strong medicine – would be effective. If the forfeiture condition discourages withdrawal, a substantial State interest – retention of private-passenger insurers – will have been advanced.

Pet. App. A20.

The court similarly rejected the Takings Clause challenge to the forfeiture condition. The court did not deny that petitioner's business licenses and attendant goodwill are a property right under state law. See Pet. App. A28 ("the property affected by the regulation is the value of the Twin City affiliates' New Jersey insurance business"). The court suggested, however, that takings of "commercial property interests," unlike real property, generally require no compensation. *Id.* at A26. Finding that there was no "physical invasion" of petitioner's intangible property, the court balanced "the private interests affected by the regulation against the public interests that are advanced." *Id.* at A27. In that connection, the court reiterated its point that "the forfeiture condition was a forceful but relevant regulatory measure imposed to advance the substantial State interest in discouraging Twin City's withdrawal from the private-passenger market." *Id.* at A27. Thus, the Takings Clause analysis and the Due Process Clause analysis come down to the same

point: may a State impose substantial financial penalties on an individual or corporation to prevent it from ceasing to do business in the State?

ARGUMENT

This case raises a constitutional question of extraordinary importance to our structure of government and market economy: May a state force a person or corporation to continue to do business within the state against its will? *Amici* submit that the right to exit or withdraw from doing business in a state is fundamental to our system of federalism; that it is one of the fundamental principles of liberty and justice which inhere in the very idea of free government; that it is deeply rooted in the customs and traditions of the Nation; and – alarmingly – that it is now under assault by states that hope to evade the adverse consequences of their own regulatory blunders by entrapping nationwide companies and forcing them to bear the costs. New Jersey's "Reform Act" is a direct assault on the exit right, justified by no governmental interest other than to force the company to pay ransom.

The courts of four states have confronted this question and have rendered conflicting decisions. The Supreme Court of New Jersey in the decision under review, plus the Supreme Judicial Court of Massachusetts in *Maryland Casualty Co. v. Commissioner of Insurance*, 363 N.E.2d 1087 (Mass. 1977), upheld state efforts to prevent insurance companies from withdrawing from their respective states. The courts of North Carolina and New York invalidated such efforts. *Hartford Accident & Indemnity Co. v. Ingram*, 226 S.E.2d 498 (N.C. 1976); *Lewis v. Safeco Insurance Co.*, 414 N.Y.S. 2d 823 (1978). The California Supreme Court upheld an insurance regulation scheme on the premise that the companies were adequately protected by their right to withdraw from the

State. *CalFarm Insurance Co. v. Deukmejian*, 771 P.2d 1247, 1262 (Cal. 1989). This case provides a clear and unambiguous opportunity for affirmation of the right of every person to choose whether to do business within a state.

We are not asking this Court to become the arbiter of the fairness or wisdom of economic legislation. This case is not about economic fine-tuning: the right of exit in our federalist system, like the separation of powers, is best understood as a *structural* protection for liberty. The right of exit is vital not just in itself, but as a check and safeguard for every other right. If persons are free to move from state to state, or to withdraw from particular activities altogether in response to oppressive state legislation, intrusive judicial review of such legislation will be unnecessary; the right of exit will protect against oppression. See *Aptheker v. Secretary of State*, 378 U.S. 500, 520 (1964) (Douglas, J., concurring). But if there is no right of exit – no right to withdraw one's services in response to oppressive state legislation – then the practical ability of states to oppress their people will be vastly advanced, and the demands for detailed judicial review correspondingly increased. Berlin Walls are built for a purpose.

I. THE RIGHT OF EXIT IS A LIBERTY PROTECTED UNDER THE DUE PROCESS CLAUSE

The right to choose whether to do business within a particular state is not mentioned in so many words in the text of the Constitution. But this Court has long recognized that – in Justice Brandeis's words – "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." *Whitney v. California*, 274 U.S. 357, 373 (1927) (concurring opinion). Enumerated rights are not the only rights given constitutional protection; other rights traditionally recognized by our society are entitled to protection as well. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804-06 (1992)

(plurality opinion); *Michael H. v. Gerald D.*, 491 U.S. 110, 121-24 (1989); *Turner v. Safley*, 482 U.S. 78, 94-99 (1987); *Meyer v. Nebraska*, 262 U.S. 390, 399-403 (1923). In particular, this Court has extended constitutional protection to rights inherent in our structure of government, to rights that are essential to a free society, and to rights deeply rooted in our legal tradition. The right of each person (including corporations) to choose whether to conduct a particular business within a particular state satisfies each of these criteria.

A. The Right of Exit Is Fundamental To Federalism As A Structural Safeguard For Liberty

The right of all persons, including corporations,[2] to move from state to state and determine for themselves whether to do business therein inheres in the federal structure of our Constitution. *Zobel v. Williams*, 457 U.S. 55, 67 (1982) (plurality opinion) (deriving the "principle of free interstate migration" from the logic of a "document that transformed a loose confederation of states into one nation"); *United States v. Guest*, 383 U.S. 745, 757-58 (1966); see also *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873) (listing interstate mobility as among the "implied guarantees of [the] Constitution" that "owe their existence to the Federal government, its National character, its Constitution, or its laws"). The right of exit imposes a natural, structural limitation on the ability of states to oppress those within their jurisdiction. If a person is free to exit, the state can impose burdens on that person only up to the point that the burdens equal the marginal benefit to the person of remaining in the state. Beyond that point, he will leave. If the State can prohibit

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[2] There can be no doubt at this late date that corporations are "persons" within the meaning of the Due Process Clause. See page 12, *infra*.

exit, however, he is vulnerable to whatever burdens or oppression the State may heap upon him. The right of exit – the right to vote with one's feet – is thus an essential backstop to the democratic process as a safeguard against oppression. See Albert O. Hirschman, EXIT, VOICE, AND LOYALTY (1970); Richard B. Stewart, *Federalism and Rights*, 19 Ga. L. Rev. 917, 923-27 (1985); Richard A. Epstein, *Exit Rights Under Federalism*, 55 Law & Contemp. P. 147 (1992).[3]

As this Court has noted, "the principal benefit of the federalist system is a check on abuses of government power." *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991). From the time of the Founding, it has been thought that "the new federalist system would suppress completely 'the attempts of the government to establish a tyranny.' " *Id.* at 2400, quoting THE FEDERALIST, No. 28, at 180-81 (A. Hamilton). See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1503-04 (1987); Andrez Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 Sup. Ct. Rev. 341, 380-91. But, as noted in *Gregory*, this depends on the existence of a "mobile citizenry." *Gregory*, 111 S. Ct. at 2399; see also *Zobel*, 457 U.S. at 68 (Brennan, J. concurring). If citizens cannot exit in response to oppressive measures, federalism serves no rights-protective purpose. Decentralization without mobility leads only to balkanization and petty fiefdoms. See F. A. Hayek, *The Economic Conditions of Interstate Federalism*, in INDIVIDUALISM AND ECONOMIC ORDER (1948); F. A. Hayek, THE CONSTITUTION OF LIBERTY 184-85 (1960).

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[3] Of course, exit rights are an *incomplete* protection against oppressive state measures in that the cost of exit (whether because of fixed investments, sentimental attachments, or lack of financial resources or opportunities) may be so high that exit is not a realistic option, and additional protections for liberty are necessary. See Epstein, *supra*, at 150-54.

Moreover, the protection accorded by the right of exit benefits not just the person who exits, but others who remain – who are protected by the *threat* of exit. A government must be restrained in its treatment of those within the jurisdiction if it knows that oppressive measures will cause withdrawal of individuals and businesses from the State. This acts as a powerful disincentive to oppressive or exploitative policies. In fact, the economic model of federalism shows that the existence of a large number of jurisdictions, coupled with a mobile citizenry, not only reduces the danger of government abuse but affirmatively creates competition among the states for more efficient and popular government. The classic exposition of this, presented in the context of achieving efficient levels of taxation and public spending, is Charles Tiebout's much-cited article, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956). More recent explorations of this theme can be found in such works as Dennis Mueller, PUBLIC CHOICE II 154-63 (1989); Daphne A. Kenyon & John Kincaid, eds., COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM (1991); Thomas R. Dye, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS (1990); Frank Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. of Law & Econ. 23, 33-35 (1983). The genius of federalism is that states and localities are forced to compete among themselves by offering superior mixes of taxes and services, and by avoiding abusive and unpopular measures. Justice Brennan has described this competition as a "healthy rivalry" that "inheres in the very idea of maintaining the States as independent sovereigns within a larger framework." *Zobel*, 457 U.S. at 68 (concurring opinion). But if citizens are not free to come and go, the competitive mechanism does not work. Tiebout, *supra*, at 420-22; Mueller, *supra*, at 155. A state with the ability to prohibit exit is like the holder of a monopoly over an

essential good: it can exploit its customers and has no incentive to improve price, quality, or service.

The right of each person (including corporations) to exit from a state in response to governmental abuse, or for any other reason, is thus an essential aspect of our federalist constitutional structure, and warrants strong constitutional protection.

B. The Right To Choose Whether To Conduct A Particular Business In A Particular State Is Inherent In The Very Idea Of Free Government

The constitutional right at stake in this case is an amalgam of two rights, each recognized as essential to free governments and free economies. First is the right to decide what business to engage in, or whether to engage in business at all. To force a person to continue to ply a trade against his will is a monstrous invasion of personal liberty, akin to involuntary servitude, and justly condemned by free governments everywhere. Second is the right to exit from a particular jurisdiction and go elsewhere. This right has often been denied by oppressive regimes, but never by a free government. It is no exaggeration to say that it is impossible to conceive of a free government or a free economy that does not recognize and honor these rights. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). The right to exit is a clear example of "one of those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' and, as such, is embodied in the concept 'due process of law.' " *Grosjean v. American Press Co.*, 297 U.S. 233, 245 (1936), quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926), and *Twining v. New Jersey*, 211 U.S. 78, 99 (1908); *Corfield v. Coryell*, 6 Fed. Cas. 546 (E.D. Pa. 1823) (including within definition of "fundamental" rights those "which belong, of right, to the citizens of all free governments"). See *Universal Declaration of Human Rights*, Art. 13.

The only reason these principles may not seem obviously applicable here is that petitioners are corporations rather than individuals. If an individual insurance agent (or butcher, or baker, or candlestick-maker) were told he had to continue to do business in New Jersey, such an order would be universally recognized as a violation of fundamental freedoms. Corporations do not naturally excite such sympathy. But this Court has held for over 100 years that corporations are "persons" within the meaning of the Fourteenth Amendment, entitled to the protections accorded the individual. *First National Bank of Boston v. Belotti*, 435 U.S. 765, 780 n.15 (1978); *Grosjean, supra*, 297 U.S. at 244; *Santa Clara County v. Southern Pacific R.R.*, 116 U.S. 394 (1886). Since no one would question the existence and importance of this right in the case of a natural person, it follows that it is protected in the case of a corporation.

To be sure, the issue might be different if the interests of the state were directly related to the corporate form of the entity that is the target of the state's order. See *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1397-98 (1990). But petitioners' corporate form has no relevance to the regulatory measures here. Similarly, the issue might be different if the constitutional right in question were "purely personal" (*First National Bank of Boston, supra*, 435 U.S. at 778-79 n.14), such as the privilege against self-incrimination (*United States v. White*, 322 U.S. 694, 698-701 (1944)). But there is nothing "personal" about the freedom to do business (or not to do business) in a particular state; indeed, the arguments for mobility apply with full force to corporations. If corporations are entitled to freedom of speech (*First National Bank of Boston, supra; New York Times v. Sullivan*, 376 U.S. 254 (1964)), property (*Kaiser Aetna v. United States*, 444 U.S. 164 (1979)), protection against double jeopardy (*United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977)), procedural due process (*Brock v. Roadway Express*, 481 U.S.

252 (1987)), and protection against unreasonable searches and seizures (*G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977)), there is no reason in logic or history that they should not be entitled to the freedom to choose whether to engage in a particular business in a particular state.

C. The Right Of Exit Is Deeply Rooted In The Customs And Traditions Of This Nation, And Has Been Recognized By This Court

The most widely accepted test for determining whether an asserted liberty, not otherwise enumerated in the text, is entitled to constitutional protection is whether it is "an interest traditionally protected by our society." *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Whether other freedoms, less firmly rooted in the tradition, may also be entitled to protection is a matter of dispute (see *Michael H.*, 491 U.S. at 137-41 (Brennan, J., dissenting)), but no member of this Court in recent times has disputed that at least the rights firmly rooted in this nation's legal tradition are protected under the Due Process Clause.

The right to refuse to do business within a state against one's will is one of the clearest possible examples of such a right. Not only do the rights to decide for oneself what business or occupation to pursue and where to pursue it have deep roots in the historical experience of this nation; this right has been explicitly recognized by this Court. If the right has not more frequently been the subject of constitutional litigation, this is because the right is *so* fundamental, *so* deeply rooted, that few states have ever been so bold as to deny it. As this Court stated in *Textile Workers v. Darlington Co.*, 380 U.S. 263, 270 (1965), the "proposition that a single businessman cannot

choose to go out of business if he wants to would represent . . . a startling innovation."

William Blackstone's COMMENTARIES ON THE LAWS OF ENGLAND, the most cited and revered legal work among the American founders, stated that the right "of changing situation, or moving one's person to whatsoever place one's own inclination may direct" is a "right strictly natural" that "the laws of England have never abridged . . . without sufficient cause." *Id.*, Bk. 1, ch. 1, at *134 (G. Chase, ed. 1878). To the Americans, the right was more than theory: it was experience. The freedom to leave a state in response to unwelcome or oppressive governmental acts was literally the first freedom exercised by our forebears as they fled religious persecution in England and came to these shores.

The importance of this freedom to the American constitutional tradition can be seen in its express inclusion in two of our earliest charters of freedoms – the Rhode Island Charter and the Massachusetts Body of Liberties. See Zechariah Chafee, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 177-78 (1956); see also *Zobel*, 457 U.S. at 79 n.9 (O'Connor, J., concurring). The Articles of Confederation carried forth this tradition, recognizing a right of "free ingress and regress to and from any other State." Art. of Confed., Art. IV. Significantly, the language of Article IV of the Articles shows that this principle had particular reference to "trade and commerce." *Id.* The principle of "free ingress and regress" remains a cherished part of our constitutional liberty today. *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969); *Zobel, supra*. As the nations of Western Europe move toward open borders for economic activity, it would be ironic if the states of the United States were permitted to undo our centuries-old tradition of open internal borders and internal movement.

The second aspect of the liberty at issue in this case – the right to choose whether to engage in a particular

occupation or business – likewise has ancient roots in the common law. Blackstone, *supra*, Bk. I, ch. 4, at *427 ("[a]t common law, every man might use what trade he pleased"); Adam Smith, THE WEALTH OF NATIONS, Bk. I, ch. 10, pt. 2, at 136 (Univ. of Chicago Press ed. 1976) (to "hinder" a man "from employing [his] strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of [his] most sacred property"). But it attained particular salience within our tradition through the experience of slavery and the "free labor" tradition that opposed and eventually unseated it. The concept of "liberty" in the Fourteenth Amendment, born of the opposition to slavery, is infused with the understanding that enforced service is antithetical to the American ideal. Thus, Abraham Lincoln stressed that each man has "a freedom to choose the mode of his work and the manner of his employer." Abraham Lincoln, SPEECHES AND WRITINGS 1859-1865, at 84 (Library of America 1989) (speech at Cincinnati, Ohio, Sept. 17, 1859). Of course, this (as with many aspects of liberty) has its greatest intuitive force in the case of natural persons. But as discussed above, the liberties of natural persons, with the exception of those that are "purely personal," have been extended to corporations as well.

This Court, too, has long recognized the right to withdraw from business as the ultimate protection against abuse of governmental power. The state has the authority to regulate, but it does not have the power to force any person to continue to conduct business when he believes the regulation has become intolerable. In *Munn v. Illinois*, 94 U.S. 113 (1876), this Court's first occasion to consider the effect of the newly ratified Fourteenth Amendment on the power of the states to regulate the rates and terms of business, the Court acknowledged a broad power to regulate businesses clothed with a public interest, but at the same time recognized the right of the regulated party to withdraw:

> When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use*; but, so long as he maintains the use, he must submit to the control.

Id. at 126 (emphasis added). The Court applied this principle to the business of insurance in *Northwestern Life Ins. Co. v. Riggs*, 203 U.S. 243 (1906). In an opinion by the first Justice Harlan, the Court held that the state has broad power to regulate the insurance industry, but insisted: "If a life insurance corporation does not approve such a restriction upon the conduct of its affairs it is its privilege to cease doing business." *Id.* at 254-55.[4]

The Court recently reaffirmed this principle in *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992). *Yee* involved the constitutionality of a rent control ordinance on mobile home sites, coupled with a law granting tenants the right to remain indefinitely and to assign their tenancy to others. The Court upheld the ordinance, but expressly noted that "[a]t least on the face of the regulatory scheme,

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[4] Other cases reiterating the right to exit include *Brooks-Scanlon Co. v. Railroad Comm'n*, 251 U.S. 396 (1920); *Railroad Comm'n v. Eastern Texas R.R.*, 264 U.S. 64 (1924); and *Wolff Co. v. Industrial Court*, 262 U.S. 522, 540-41 (1923). It would be a mistake to suppose that these decisions were nothing more than aspects of the discredited substantive due process theories of the *Lochner* era. Some of the opinions were written by the dissenters in *Lochner* (Justice Holmes wrote *Brooks-Scanlon* and the first Justice Harlan wrote *Northwestern Life*.). Indeed, the exit right was typically invoked as part of the justification for *upholding* economic regulation. For discussion of the current vitality of the doctrine in the railroad context, see *Gibbons v. United States*, 660 F.2d 1227, 1233-34 (7th Cir. 1981).

neither the City nor the State compels petitioners, once they have rented their property to tenants, to continue doing so." *Id.* at 1528. This was based on the fact that the landlord was permitted to evict his tenants if he wished to change the use of his property. Thus, the fundamental right to exit the business altogether was preserved. The Court stated that "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Id.* at 1529. It is important to stress that in both *Munn* and *Yee*, as well as the intervening cases, the business owner's constitutional rights were *not* limited to the right to obtain just and reasonable rates. In addition, the owners enjoyed the privilege of abandoning the business, if they so chose. See also *FCC v. Florida Power Corp.*, 480 U.S. 245, 251-52 n.6 (1987); *Fresh Pond Shopping Center v. Callahan*, 464 U.S. 875 (1983) (Rehnquist, J., dissenting).

A limited exception to this principle has been recognized in the case of public utilities providing a service to the public under a certificate of public convenience and necessity. In such circumstances, the government has a recognized authority to forbid abandonment of the service to the public, at least where the enterprise as a whole is guaranteed a fair rate of return. *Fort Smith Light & Traction Co. v. Bourland*, 267 U.S. 330 (1925); *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137 (1960); *Southern Ry. v. North Carolina*, 376 U.S. 93 (1964). But in these cases, the obligation to continue in service was "voluntarily assumed" (*Bourland*, 267 U.S. at 332) in exchange for particular privileges, usually including protection from competition. The public confers monopoly privileges on a firm in order to secure universal and reliable service at average cost, and is entitled to the benefit of its bargain. New Jersey has conferred no monopoly privileges on petitioner, and petitioner did not "voluntarily assume" any obligation to remain.

II. THE CONSTITUTIONAL RIGHT OF EXIT IS PLAINLY IMPLICATED BY THE ORDER UNDER REVIEW

There can be no question that the constitutional right to exit is burdened by the order under review in this case. The five year condition explicitly precludes exit for a lengthy period of time (estimated to cause losses of $100 million), and the forfeiture conditions effectively make the restriction on exit perpetual. In effect, the State proposes to punish Twin City and its affiliated companies by a loss of over $160 million in annual revenues if the company withdraws from the automobile insurance market. The New Jersey Supreme Court admitted that the "economic impact is potentially quite severe" (Pet. App. A30), but averred that "strong medicine" was necessary in order to "discourage withdrawal." *Id.* at A20. If a state may impose so substantial a penalty for no purpose other than to discourage the exercise of the right, the constitutional right of exit is meaningless.

The only interest the State has in preventing exit is to coerce the shareholders of automobile insurance companies into shouldering financial obligations that were caused by the regulatory ineptitude of the state legislature.[5] These costs, like any other costs of maintaining

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[5] There is no plausible argument in this case that the exit restraint is needed either to ensure that the companies will continue to fulfill their contractual obligations incurred in past years or to prevent disruption in insurance markets. Petitioners' "plan for orderly withdrawal" provided for the payment of claims on past policies, and respondent has not questioned the adequacy of the plan in that respect. As to preventing disruption, the four conditions under challenge actually exacerbate any dislocation that might be caused by petitioners' withdrawal from the market. The new business condition means that more New Jersey drivers will be forced to seek alternative insurers at

state government, "in all fairness and justice, should be borne by the public as a whole" (*Armstrong v. United States*, 364 U.S. 40, 49 (1960)) – not by selected targets of convenience. It is not irrelevant to the political logic of the state's scheme that the burdens must be passed on to shareholders and customers in other states, and may not be reflected in the rates charged to New Jersey policyholders. The right of exit is especially important to those who are not represented in the legislature. There is scant constitutional limit on the level of taxation the state may impose on this business, but it is unconstitutional for the state to take away the one remaining right of self-preservation: the right to get out and go elsewhere, without punishment or penalty.

If states are free to impose oppressive levels of taxation and regulatory burdens on persons and corporations, and then to impose "severe" penalties on them for departing, there is nothing left of one of the most foundational of our constitutional rights. If the decision below is allowed to stand, state legislatures and state courts will surely seize the opportunity to exploit nationwide businesses by blocking exit, and one of the key structural features of our constitutional order will be imperiled. Review by this Court is necessary to define and enforce the constitutional right of every person to refuse to do business in a state against his will.

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the end of the five year period; and the other business and forfeiture conditions needlessly disrupt other lines of insurance for no reason other than to punish the exercise of the right to exit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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